

No. 11400

United States
Circuit Court of Appeals

For the Ninth Circuit.

TITUS CORBETT, MARTHA WOODS COR-
BETT and LOTTIE FRANK, Administratrix
of the Estate of Levi Frank, Deceased,
Appellants,

vs.

JOHN C. WILKERSON,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

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In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

No. 244.

MARTHA WOODS CORBETT,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

COMPLAINT

The plaintiff alleges:

I.

Jurisdiction founded on diversity of citizenship and amount. Plaintiff is a citizen of the State of Idaho, and defendant is a citizen of the State of Washington. The amount in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars (\$3000.00).

II.

On Sunday, September 9, 1945, on a public highway, called Highway No. 830, twenty-eight miles west of Goldendale, in the State of Washington, defendant negligently drove a motor vehicle against plaintiff, who was then walking on the edge of said highway.

III.

As a result plaintiff was thrown down, had her back broken and her leg severely injured, was prevented from transacting her business, suffered great

pain of body and mind, and [1*] incurred expenses for medical attention and hospitalization in the sum of Seven Hundred Twenty-five Dollars (\$725.00).

Wherefore, plaintiff demands judgment against defendant in the sum of Twenty-five Thousand Dollars (\$25,000.00) and costs.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Plaintiff.

Filed: Dec. 12, 1945. [2]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

No. 245.

LOTTIE FRANK, Administratrix of the
Estate of Levi Frank, Deceased,
Plaintiff,

vs.

JOHN C. WILKERSON,
Defendant.

COMPLAINT

The plaintiff alleges:

I.

Jurisdiction founded on diversity of citizenship

* Page numbering appearing at foot of page of original certified Transcript of Record.

and amount. The plaintiff is a citizen of the State of Idaho, and defendant is a resident citizen of the State of Washington. The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars (\$3000.00).

II.

Plaintiff is the duly appointed, qualified and acting administratrix of the estate of Levi Frank, deceased.

III.

On Sunday, September 9, 1945, on a public highway called Highway No. 830, twenty-eight miles west of Goldendale, in the State of Washington, defendant negligently drove a motor vehicle against one Levi Frank, the late husband of plaintiff, who was then walking on the outer edge of such highway.

IV.

As a result Levi Frank was thrown down and killed, and by reason thereof plaintiff has been deprived of his love, affection, companionship, and support.

Wherefore, plaintiff demands judgment against defendant in the sum of Twenty-five Thousand Dollars (\$25,000.00) and costs.

J. H. FELTON,

BERNICE BACHARACH,

Attorneys for Plaintiff.

State of Idaho,
County of Idaho—ss.

Lottie Frank, being first duly sworn, on oath,
deposes and says:

That she is the plaintiff herein; that she has read
the foregoing complaint, knows the contents thereof,
and that the allegations therein made are true, as
she verily believes.

LOTTIE FRANK.

Subscribed and sworn to before me this 6th day
of December, 1945.

(Seal) HARRY J. HANLEY,
Notary Public.

Filed Dec. 12, 1945. [4]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

Civil No. 244

MARTHA WOODS CORBETT,
Plaintiff,

vs.

JOHN C. WILKERSON,
Defendant.

ANSWER

For answer to plaintiff's complaint defendant
admits, denies and alleges as follows:

1.

For answer to paragraphs I, II and III of plain-

tiff's complaint this defendant denies each and every allegation therein contained.

For an Affirmative Defense defendant alleges:

1.

If plaintiff was injured or damaged in any respect as claimed in her complaint, such injury and damage was solely and proximately caused by plaintiff's own contributory negligence in failing to observe other users of the highway and failing to give other users of the highway the right of way to which they are entitled, in failing to walk upon the extreme left hand side of the highway as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of the defendant and to step to the left out of the path of his approaching car as required by said Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and being in an intoxicated condition and while in such condition walking or standing in the center of the highway, in failing to signal or warn defendant of the position of the plaintiff when plaintiff had an opportunity so to do.

Wherefore, defendant having fully answered the complaint of the plaintiff prays that the same be dismissed and that he have and recover his costs herein expended and incurred.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Defendant.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

Civil No. 245.

LOTTIE FRANK, Administratrix of the
Estate of Levi Frank, Deceased,
Plaintiff,

vs.

JOHN C. WILKERSON,
Defendant.

ANSWER

For answer to plaintiff's complaint defendant
admits, denies and alleges as follows:

1.

For answer to paragraphs I, II, III and IV of
plaintiff's complaint this defendant denies each and
every allegation therein contained.

For an Affirmative Defense defendant alleges:

1.

If plaintiff was injured or damaged in any re-
spect as claimed in her complaint, such injury and
damage was solely and proximately caused by the
deceased's own contributory negligence in failing
to observe other users of the highway and failing
to give other users of the highway the right of
way to which they are entitled, in failing to walk
upon the extreme left hand side of the highway

as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of the defendant and to step to the left out of the path [7] of the approaching car as required by said Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and being in an intoxicated condition and while in such condition walking or standing in the center of the highway, in failing to signal or warn defendant of the position of the deceased when the deceased had an opportunity so to do.

Wherefore, defendant having fully answered the complaint of the plaintiff prays that the same be dismissed and that he have and recover his costs herein expended and incurred.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendant.

Filed Jan. 21, 1946. [8]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Consolidated Civil Cases Nos. 244 and 245.

TITUS CORBETT and MARTHA CORBETT, husband and wife,

Plaintiffs,

vs.

JOHN C. WILKERSON,

Defendant,

and

LOTTIE FRANK, administratrix of the estate of LEVI FRANK, deceased,

Plaintiff,

vs.

JOHN C. WILKERSON,

Defendant.

Before: Hon. Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington.

Yakima, Washington, May 8 and 9, 1946.

Be it remembered:

That the above entitled cases consolidated for trial came regularly on for trial and determination before the Hon. Sam M. Driver, United States District Judge for the Eastern District of Washington, on Wednesday, May 8, 1946, at Yakima, Washington; the plaintiffs appearing by Mr. J.

Henry Felton and Miss Bernice Bacharach; and the defendant appearing by counsel Nat U. Brown and F. S. Senn.

Whereupon, both sides having announced that they were ready for trial, Mr. Felton made an opening statement on behalf of the plaintiffs, and the following proceedings occurred, to-wit:

Mr. Brown: If the Court please, I had not anticipated that such a statement would be made, but in view of the fact that it has been made, I would desire to move for dismissal [1*] of the cases on the ground of what has been stated and—

Mr. Felton: I believe it is a proper opening statement.

Mr. Brown: I believe his statement, coupled with the complaint shows that the plaintiffs were guilty as a matter of law of contributory negligence and have no standing in court.

The Court: The motion will be denied.

Mr. Felton: I will call Mr. Hyland.

GORDON E. HYLAND

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Give your name to the court reporter.

A. Gordon E. Hyland. (H-y-l-a-n-d spelling)

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Gordon E. Hyland.)

Q. Where do you live, Mr. Hyland?

A. I live at Goldendale .

Q. And what is your official position for the State of Washington?

A. I am a Patrolman for the Washington State Patrol.

Q. How long have you been on the Washington State Patrol?

A. About two years. [2]

Q. Are you trained in examining highways and other places where accidents occur?

A. Right.

Q. And what does your training consist of?

A. We take a course every year under instructors in our own department and from outside departments, plus our experience on the highways in investigations.

Q. And as a patrolman and with the benefit of your training, did you make an examination of a highway point where the accident that we are talking about occurred? A. I did.

Q. And when did you make such an examination?

A. Immediately following the accident and the following day—I wouldn't say the following day. It was on the same day but it was after it became daylight.

Q. I am going to ask you some questions at this time which will be limited to physical facts; that is, so that the Court may know the physical facts surrounding this thing, and I want you to

(Testimony of Gordon E. Hyland.)

direct your testimony as to the condition of the road and so on, as of the morning of December 9, 1945. Each one of my questions will be directed to that thing. Now, when you went over there on the morning of December 9, 1945, what kind of highway did you find?

A. Weather conditions or road conditions?

Q. First, weather conditions, if you will please? [3]

A. The weather was clear and the road was dry. It is black top but is termed a non-standard type of pavement, rough finish on top.

Q. What is the width of the black top?

A. At that particular point, nineteen feet and six inches, the paved portion of the roadway.

Q. Is there a shoulder on the road?

A. Yes.

Q. Of what material?

A. Loose gravel and dirt.

Q. It was loose rock and dirt?

A. (Nodding head).

Q. Answer so that the reporter can get it.

A. Yes.

Q. What was the condition as to its being level or rolling?

A. There is a slight crown in the roadway. I am not in a position to say how much crown.

Mr. Felton: Can you make a drawing of the roadway and the position of the cars at the time you arrived there.

(Testimony of Gordon E. Hyland.)

Mr. Brown: Can't we use the blackboard and put it over there and make it large enough.

The Witness: Permissible to use my notes to refresh my memory?

Mr. Felton: May he use his notes? [4]

Mr. Brown: No objection.

The Witness: These notes were made at the time.

The Court: Yes.

Mr. Felton: I tell you, if you wish, we will put it on the black board and we can make copies of it.

Mr. Brown: I would rather have it on the black board.

Mr. Felton: All right, now, you draw the physical facts as you saw this on that day on the black board and stick to physical facts, will you.

The Witness: (Drawing on black board) Well, this may take some explaining. This wavy line is merely a chopping off of the end of the area.

The Court: Yes, I understand it.

Mr. Felton: Q. Go ahead and explain your road. Where is your black top?

A. We have nineteen feet, six inches of black top. This width here is the shoulder on this side of the road three feet and this side of the road it is two feet here.

Q. Now, which is north and which is south on that map; well that is away from the river?

A. Yes, right.

Q. Mark the word "river" on the other side.

(Testimony of Gordon E. Hyland.)

A. The Columbia River is down here.

Q. Write "river" so that we can get to it for the other witnesses. Now, where was Mr. Corbett's car? [5]

A. Well, we will take out some shoulder up here.

Q. Was Mr. Corbett's car parked on or off of the highway?

A. It was completely off of the highway. This particular spot up here is a turn-out or driveway on to a private road. He was parked in this turn-out into the driveway.

Q. And he was pointed in which direction?

A. He was pointed west.

Q. And where was Mr. Wilkerson's car?

A. At the time I arrived at the scene of the accident Mr. Wilkerson's car was down here in about this position.

Q. And were there any skidmarks on the road?

A. There were sixty-three feet of skidmarks. This at the scale is—this is a long ways out of perspective but—

Q. Where is the top of the hill?

A. It is just beyond the point where this car is parked. It is possible from this position to see the parked place, the parking spot where this car was sitting but if it was another two car lengths, you wouldn't.

Q. Now, where were the bodies—when you got there, there was one body, I believe.

A. As far as I know, there was only one. When

(Testimony of Gordon E. Hyland.)

I arrived there was but one body about in this position.

Q. And was there anything there to mark the spot, willows, I mean? [6]

A. Right here to the shoulder of the road was willows. This was all high grass down here and from here on down it was rock.

Q. How far could you see where the body was; from the point on the pavement where the body was, back west, what was the distance that lights were visible, if you know?

A. There is a distance here from the position of the body to the crest of the hill of 272 feet.

Q. And did you observe to see how far you could see another car from the crest of the hill or a point beyond?

A. This measurement which I made of 272 feet was taken from the "no-pass zone" striping.

Q. And, then, a car coming over the crest of the hill could see at least 272 feet to the point that you are talkin about?

A. He would be able to see whether there was another vehicle here.

Q. Or anything of the height of another vehicle?

A. Yes, or anything of the height of another vehicle. Those passing zones are based upon ordinary heights of cars. Those measurements were taken from the striping points of the highway department.

Q. Could you ascertain who was the driver of the death car? A. Mr. Wilkerson. [7]

(Testimony of Gordon E. Hyland.)

Q. From what did you ascertain that?

A. From him.

Q. He told you? A. Yes.

Mr. Felton: Will you draw it out on paper exactly what you have here and then we will have it that way on paper.

Mr. Brown: One more thing, is there a ditch on that shoulder.

The Witness: There is a ditch on both shoulders.

Mr. Felton: How deep were the ditches?

The Witness: I believe between two and two and a half feet.

Mr. Felton: All right, you may sit down.

The Court: I suggest, Mr. Felton, that you proceed with the examination and after the witness gets off of the witness stand copies may be made of the drawing which may be submitted to counsel and then submitted to the Court.

Mr. Felton: Yes, your Honor, I had that in mind.

Cross Examination

By Mr. Brown:

Q. Mr. Hyland, what is the height of the ordinary car that they use to make that measurement?

A. For the measurement, I don't know. [8]

Q. Have you any idea?

A. Well, it is over six feet.

Q. You don't know just what height they use in determining where the crossing line will be put in, the line for passing?

(Testimony of Gordon E. Hyland.)

A. No, they use two automobiles in determining that distance.

Q. Do they use patrol cars?

A. The highway department making these "no-pass zones" takes two vehicles and one of them in one direction and one of them in another, and when it is possible for the drivers in this position to see any portion of the other vehicle that is where you mark the start of the passing stripe.

Q. And the distance where you could see anyone lying on the ground would be very much less than that?

A. Yes, right.

Q. And people standing or walking would be less than that providing they would be under six feet?

A. It would be the difference between the person and the height of the automobile.

Q. And that distance would shorten very materially with anything less than the height of the automobile?

A. I presume it would shorten it, yes.

Q. How soon after the accident did you come out there, do you know? [9]

A. Oh, that, I can't remember.

Q. Were there any other cars parked around there?

A. There was one other vehicle — two other vehicles at the time I arrived. On the pavement in this position was the ambulance from The Dalles (indicating on drawing) which had loaded one of

(Testimony of Gordon E. Hyland.)

the people involved. Down at this point where he could crowd off at the shoulder was a truck tractor and truck trailer.

Q. Now, did you ascertain whether this truck tractor had been there prior to the accident?

A. He had not been.

Q. Was there another car up here prior to the accident?

A. None, as far as I know.

Q. Just the plaintiff's car? A. Yes.

Q. Was the plaintiff's car parallel to the road or slightly facing the road so that its lights would shine across?

A. That I couldn't say.

Q. Didn't you notice that? A. No.

Q. Did you notice whether the lights were on the car when you arrived? A. No.

Q. Isn't it a fact that this car was turned more lined [10] like this pencil lying at a forty-five degree angle pointed down the road with its lights on? A. I don't know.

Q. Who assisted you in making these measurements?

A. Well, my—I might state that—

Q. I beg your pardon?

A. I might state for the information of the Court that these measurements were not all made at the same time.

Q. I am interested in this now; first, did you say that there was sixty-three feet of skidmarks when those measurements were made?

(Testimony of Gordon E. Hyland.)

A. Those were made at the scene of the accident.

Q. When? That same night, or——

A. Yes, that same morning.

Q. And who assisted you in making those?

A. The Sheriff of Klikitat County.

Q. That was Sheriff Woodward? A. Yes.

Q. He is no longer Sheriff? A. Right.

Q. He had a deputy there? A. Yes.

Q. Did all of them assist you? A. No.

Q. Just the Sheriff? [11] A. Yes.

Q. And who called the measurements out; he did, and you put them down, or did you actually handle the tape yourself?

A. I handled the measuring end of the tape.

Q. There is a difference between what you call a skidmark and a tire mark, isn't there, Mr. Hyland?

A. Well, I would like to have an explanation of the question. Are you talking about——

Q. Well, there are tire marks where the car has been slowed down suddenly, even though the tires don't skid, isn't that true?

A. I wouldn't say that that was true on dry non-skid black top, no, not in our vernacular of a skidmark.

Q. Isn't it a fact that when you put on your brakes and when you slow your wheels down that your wheels may still be turning, and the wheel makes a tire mark?

(Testimony of Gordon E. Hyland.)

A. Well, that is right. In our business we still consider that a skidmark.

Q. Well, in our business we don't. Well, are these marks, marks that indicate that the tires were still rolling and where the car was shoving the wheels faster than they were rolling?

A. That form of marks on the pavement could be definitely made whether the wheels were still locked or [12] rolling.

Q. The wheels were on a turn?

A. Right.

Q. So that isn't it a fact that if this car were suddenly turned and the car would skid that the marks wouldn't be directly behind one another, that the back end would swing over as it was skidding?

A. I don't quite get your question.

Q. Well, these marks show that the car turned on the——

A. (Interposing): To the left.

Q. To the left before the skidmarks started or before these marks started.

A. That I couldn't determine.

Q. Well, you show them on the turn all the way through?

A. Well, I was unable to determine whether the car started to turn before it skidded, no.

Q. Now, when it made that turn and while the tires were locked and skidding, wouldn't the rear end turn around if it were skidding?

A. Well, the skidmarks weren't directly right on top of one another.

(Testimony of Gordon E. Hyland.)

Q. Well, you mean the rear wheel would be on top of the front wheel, is that it? [13]

A. No.

Q. Did these skidmarks go right up to where the car was standing? A. Yes, right.

Q. Now, as to the position of this body that you saw there, you don't know whether that had been moved or not before you arrived?

A. No, other than the statement of the people there was all.

Q. We are not interested in the statement of the people.

A. We had no way of determining.

Q. The girl was already in the ambulance when you arrived? A. Yes.

Q. You didn't talk to her at all?

A. I attempted to talk to her at the hospital.

Q. How much later was that?

Mr. Felton: If the Court please, we object to that as improper cross examination.

The Court: He may answer.

A. Oh, from the time I arrived, I would say within one hour and a half.

Mr. Brown: Q. Was she conscious then when you talked to her? [14] A. Yes.

Q. Was there any indication of her having been drinking?

Mr. Felton: If the Court please, we believe that that is improper cross examination and we object to it as such.

(Testimony of Gordon E. Hyland.)

Mr. Brown: It may be improper cross examination, your Honor, but he is their witness and he is only going to be here for a little while and I can make him my witness.

Mr. Felton: The witness is going to be here all during the trial, and drinking will be taken care of later.

Mr. Brown: All right, if you wish. I will withdraw the question.

Mr. Felton: Mr. Hyland, you may draw that map at your leisure.

The Court: Q. Do you have a record of the time you came down there, the approximate time?

Mr. Brown: Oh, one other thing. Q. How far from the shoulder would you say that the outer skid mark was?

A. Between two and a half and three feet.

Q. About the width of the shoulder inside of the pavement, one the pavement?

A. A little less than that.

Mr. Brown: That is all.

The Court: I have asked the witness this question: If he could tell me the approximate hour when he went down [15] and examined the accident. I don't believe that that has been testified to.

Mr. Felton: I don't believe so either.

The Witness: I received my first call from the city police department at two-twenty o'clock a.m. I was at the scene of the accident at two-forty-five a.m.

(Witness excused.)

TITUS CORBETT

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Your name is Titus Corbett? A. Yes.

Q. How old are you, Mr. Corbett?

A. Thirty-four.

Q. Where do you live?

A. Kooskia, Idaho.

Q. You have a permanent home there, have you not? A. Yes.

Q. Are you married? A. Yes.

Q. To whom are you married?

A. Martha Corbett. [16]

Q. And you have been married to her at all times during the time we have been talking about here? A. Yes.

Mr. Brown: If the Court please, could I interrogate at this point. I didn't know he was the plaintiff's husband.

The Court: Yes.

Mr. Brown: Q. Are you the husband of the plaintiff? A. Yes, that is right.

Mr. Brown: I move that he be made a party plaintiff in this case.

Mr. Felton: I have no objection.

The Court: The motion will be granted.

Mr. Felton: Q. And did I ask you your age?

A. You started to, I think. It is thirty-four.

(Testimony of Titus Corbett.)

Q. You owned the automobile that your group was riding in on September 8th and 9th?

Q. Yes.

Q. And you were riding in the automobile, and who was with you in the automobile when you went to Celilo?

A. Well, Levi Frank was sitting next to me in the middle and Roy Whittaker on the outside, the three of us in the front seat. Directly in back of me was my wife and then Jane White was in the middle and Rachael Wilson was on the opposite side, the three of them in the back seat.

Q. That was at the time you came up to this turn-out [17] we are talking about?

A. Yes.

Q. You had previously been up at Goldendale, Washington? A. Yes.

Q. You heard the officer testify as to the highway? A. Yes, sir.

Q. And the physical facts on the highway?

A. Yes.

Q. When you came up to this point that he found your car what did you do?

A. What do you mean?

Q. When you came up to this point, what did you do when you first came up?

A. Well, —

Q. Don't get up, just stay there.

A. Well, just before I moved to this parking place I was on the shoulder of the road and some soldier came up and told me I can't—

(Testimony of Titus Corbett.)

Q. Never mind what you were told. You came to the parking spot? A. Yes.

Q. How were you parked?

A. Parallel with the road off of the black top.

Q. In which direction?

A. Pointing to the west in this way. [18]

Q. Where did your passengers go to?

A. They went up the road, I don't know how far.

Q. They went up the road for a call of nature?

A. Yes.

Q. You and your wife had some discussion but did not get into an argument, is that right?

Mr. Brown: Objected to, your Honor.

The Court: Objection sustained. It is leading. Proceed.

Mr. Felton: Q. Who stayed with you in the car when the car was parked?

A. Mr. Whitaker.

Q. Where were your other four passengers, did you say?

A. Well, they went up the road, which side I don't know but they went up the road back of the car.

Q. That was east?

A. Yes, to the east.

Q. And when did you first see Mr. Wilkerson's car?

A. Well, I never at all until after the accident.

Q. I mean, when did you first see it?

(Testimony of Titus Corbett.)

A. Sometime later they told me whose car it was.

Q. When did you first see it that evening, when you first saw it approaching you?

A. Do you mean what time?

Q. No, I am talking about the position on the road; did [19] you see his car approaching you?

A. Yes.

Q. Tell the Court what you saw.

A. Well, I saw this car coming and it was coming pretty fast, and so I started dimming and blinking my lights and I pushed them on dimmer and this other car never did dim his lights.

Q. Then, what happened, what did you do when he came across your light; just tell us?

A. Well, he was going fast, you see, quite fast and not long after he passed me I heard somebody scream and call my name.

Q. And then what did you do?

A. I jumped out of the car and I run down the road and I found this one man Mr. Frank lying along the road on the shoulder of the road approximately three feet from the black top.

Q. And what was his position; how was he lying?

A. He was lying with his head to the north.

Q. And where was your wife?

A. My wife, she was lying in a ditch about ten feet from the—well, it would be about seven feet horizontal distance to the bottom of the ditch.

Q. Where was Jane White and Miss Wilson?

(Testimony of Titus Corbett.)

A. They were standing beside Mr. Frank. [20]

Q. Did you observe your wife's condition?

A. I did.

Q. And what was it?

A. Well, she was crying, suffering in pain and so I walked down into the ditch and I saw her foot was badly mangled, you see, full of crushed rock and dirt and weeds and grass and everything.

Q. Now, did you have a light with you?

A. Yes, I had a flashlight.

Q. You had a flashlight? A. Yes.

Q. Then, what did you do?

A. Well, she told me she was cold and she was crying and suffering.

Q. Now, keep the conversation out of it. You went ahead and got a blanket, did you?

A. Yes, I did, I went and got a blanket.

Q. Keep the conversations out except where Mr. Wilkerson was present. What did you do?

A. I got a blanket from my car and she stayed in the ditch where she was lying until the ambulance came.

Q. How long was it before the ambulance came?

A. I would say approximately that it was two hours, around that, after the accident.

Q. And where was Mr. Wilkerson at that time, if you [21] know?

A. Well now, when I saw him he was standing on the opposite side of the road talking to some man.

(Testimony of Titus Corbett.)

Q. You stayed with your wife then until that ambulance came? A. That is right.

Q. And this ambulance took your wife where?

A. To The Dalles Hospital.

Q. Did you know what the condition of Levi Frank was?

A. Well, he was lying there motionless.

Q. And it was later determined that he was what? A. That he was dead.

Q. Did he make any motion or sound from the time you went up there? A. No.

Q. Who came down to investigate the accident?

A. Well, this state patrolman came down there, this man here that just testified.

Q. Did anybody else come that you know of?

A. Not that I know of.

Q. Was there any inquest or anything of that nature? A. What?

Q. Any inquest held?

A. No inquest whatsoever.

Q. Did you go to The Dalles by yourself or were you [22] taken there?

A. I was taken.

Q. Do you know what the instruction were when you were taken there? A. Yes.

Q. What were the instructions?

A. This state patrolman told the ambulance man to take me to the jail and hold me until they could question me.

Q. Were you taken to the jail? A. No.

Q. Where did you go?

(Testimony of Titus Corbett.)

A. To The Dalles Hospital.

Q. What happened there?

A. They took her and put her on a cot and the first thing they did was to give her injections to quiet her down because she was suffering.

Q. Did you look at the foot?

A. Yes, I did.

Q. Tell the Court about her foot.

A. It was badly mangled and the skin was torn off at the top at the toes and badly mangled, full of crushed rock and pretty bad looking.

Q. How long did your wife stay at the hospital?

A. Six weeks or thereabouts.

Q. Prior to that time she had been in the hospital, what [23] had she been doing?

A. Working at the shipyards.

Q. Where?

A. In the Albina Shipyards in Portland, Oregon.

Q. How old was your wife?

A. Twenty-six.

Q. Was she in good health before this thing?

A. Yes.

Q. Had she had any trouble with her foot?

A. No.

Q. Any trouble with her back? A. No.

Q. Was there an injury to her back, so far as you know? A. Severe injury.

Q. What?

A. There must be some kind of fracture because she couldn't move. I went there in the morning at

(Testimony of Titus Corbett.)

seven o'clock. I couldn't even sit on the bed because that disturbance would irritate her. That was how severe she was hurt.

Q. You stayed around The Dalles until she got well, did you?

A. Yes, six weeks.

Q. Where did you take her?

A. I took her to my home, Kooskia, Idaho.

Q. Your home where? [24]

A. Kooskia, Idaho.

Q. Now, let us go into this defense work a little bit more that she was doing. How long was she——

Mr. Brown: Objected to, if the Court please, there is no pleading of any time loss, or mention of the time loss. It is \$725 medical care and \$25,000.00 general damages.

Mr. Felton: I believe under the new rules it isn't necessary.

The Court: There is an allegation here that she was prevented from transacting her business. I will let it in and consider whether or not it should be allowed.

Mr. Felton: Q. The question was to describe her defense work a little better and more particularly than you have done. Where did she first work at defense work?

A. She first worked at San Diego, California.

Q. What did she do?

A. She was a riveter there.

Q. Do you know what wages she received?

(Testimony of Titus Corbett.)

A. Fifty to seventy-five dollars per week.

Mr. Brown: My objection goes to all of this.

The Court: Yes, the record will show that it does.

Mr. Felton: Q. And where did she later work?

A. She worked in Portland.

Q. How long did she work in Portland?

A. Oh, between eighteen months and two years.

Q. What was she doing there?

A. She was a welder.

Q. What were her wages there?

A. Between fifty and seventy-five dollars per week.

Q. Now, breaking it down, what was her hourly wage?

A. \$1.25 per hour.

Q. Now, that builds up in overtime?

A. Yes, it does considerably.

Q. And what was her hourly rate in California?

A. Ninety-five cents an hour.

Q. Now, coming back to her time in the hospital, just describe to the Court how she looked and felt during the various times that you went in her room; give the Court some idea of how she was while you were there.

A. Well, she suffered very much from this injury and in fact lots of times when I went in she seemed to be crying and she would be crying. She suffered and they couldn't do very much about it. They could only give her so much medicine. And

(Testimony of Titus Corbett.)

she lost so much weight while she was in the hospital.

Q. And how long did this plan last?

A. It subsided in seven or eight days until they gave her the second operation.

Q. Well, the operation will be put in by the doctor. A. Yes. [26]

Q. Is she suffering pain still?

A. Yes.

Q. And what is her condition?

A. Well, when she has to stand on her foot and has to be on her feet she has to favor that foot and keep it over on an angle, and her back bothers her considerably. In fact, she can't lie on her back.

Q. How about the rest of the time?

A. She can't lie or stand very much at a time.

Q. Does she wear any mechanical aid?

A. She has a drop-foot brace.

Q. And what did she wear before that?

A. None, not any at all.

Q. Did she wear crutches for a while?

A. Yes, she did.

Q. For how long?

A. Well, about five or six months she had to use crutches.

Q. I am reminded that I left out the time of the accident; when was it again? Oh, do you remember about what time you stopped up there on the hill?

(Testimony of Titus Corbett.)

A. I would say it was approximately one o'clock or near one o'clock.

Q. And about what time do you think the accident occurred? [27]

A. Well, it was—I would say about one o'clock, it either could have been a few minutes before or a few minutes afterward.

Q. It wasn't very long after you stopped there?

A. No, it couldn't have been very long.

Q. Did you notice any other cars there at the particular time that the accident occurred, either passing or coming or going or anything else?

A. There was no cars except this car that was approaching me.

Q. And your own car?

A. And my own car.

Q. You are sure of that?

A. Positive.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. You told us just a few minutes ago that some soldiers told you to move up and park some other place, and weren't they there at the time of the accident?

A. No, they were not.

Q. Isn't it a fact that they just moved up a little ways and parked?

A. No, there was not other car there. [28]

Q. Answer my question: Didn't you see these same soldiers right after the accident?

(Testimony of Titus Corbett.)

A. No.

Q. The same soldiers? A. No.

Q. Didn't they talk to you? A. Positive.

Q. You are also sure that the highway patrolman told the ambulance driver to go with you to the jail?

A. He told the ambulance driver to have me in jail so that they could be there and question me.

Q. Is that this gentleman that just testified that told the ambulance driver that?

A. Yes.

Q. Are you sure of that?

A. Yes, he told the ambulance driver that before we left.

Q. Where were you parked before these two soldiers told you you better move your car?

A. I would say about thirty feet back.

Q. Back in here some place (indicating on map)?

A. Yes, back in here someplace (stepping down to map).

Q. That would be thirty feet east of where you ultimately parked your car?

A. Yes, that is right. [29]

Q. How did these soldiers happen to talk to you?

A. Well, I was parked on the shoulder of the road and they told me I had better move to a better parking place.

Q. Where were your wife and the rest of the people when you were up the road?

(Testimony of Titus Corbett.)

A. They went up the road in back of the car.

Q. As a matter of fact, they were out in the middle of the road, weren't they?

A. I didn't know where they were until I seen them.

Q. Well, I know, you moved your car up a considerable distance? A. Yes.

Q. Did you say anything to your wife that you were moving your car? A. No.

Q. Did you see her at all while you were moving the car? A. No.

Q. So, you don't know where she was?

A. No, she may have been up the road.

Q. Who did she go up the road with?

A. Jane White and Rachael Wilson.

Q. Jean? A. No, Jane.

Q. And who was the other one? [30]

A. Rachael Wilson.

Q. Did Mr. Frank go up with them?

A. No, not at that time.

Q. Did he stay in the car with you?

A. He left shortly after.

Q. When they first got out he stayed in the car?

A. Yes, he left shortly after.

Q. Was he in the car when you moved the car?

A. Yes.

Q. Did he get out? A. No.

Q. Isn't it a fact that he got out to pick up your wife off of the road? A. No.

Q. Didn't the soldiers tell you to get her off of the road? A. No.

(Testimony of Titus Corbett.)

Q. You stayed in the car until after the accident? A. Yes, that is right.

Q. You were about the brow of the hill when this car passed? A. Yes.

Q. You didn't hear your wife scream?

A. I didn't hear my wife scream.

Q. You heard somebody scream? [31]

A. Yes.

Q. You don't know what he did after he passed you or what the other car did that was approaching you, whether he slowed down?

A. If he had to turn—he did not slow down.

Q. Well, you don't know whether he did or not?

A. I don't know whether—I would say that he did not slow down.

Q. How do you know? You did not see him. You testified that you did not see him and did not know about the accident until you heard a scream. How do you know that he was approaching fast?

Mr. Felton: We object to this line of cross examination.

The Court: You may proceed with the witness. Read the question, Mr. Reporter.

(Last question read.)

A. Well, in that distance at the speed that he was going, he couldn't slow down.

Mr. Brown: Q. Now, how far was it from your car when you first saw him?

A. Oh, I would say three hundred yards.

Q. How far beyond your car?

(Testimony of Titus Corbett.)

A. Do you mean beyond? Do you mean how far was he when I first saw him? [32]

Q. When you first saw him approaching.

A. Well, I saw his lights a considerable distance down the road when I started blinking my lights on him, about three hundred yards.

Q. Your car was clear off of the road?

A. That is right.

Q. Clear off of the road? A. Yes.

Q. Was it beyond the shoulder on that turn-off?

A. Yes.

Q. Clear beyond the shoulder? A. Yes.

Q. And there were weeds and high grass in the ditch beyond the turn-off along that side of the road? A. No.

Q. There is no ditch?

A. Yes, there is a ditch.

Q. And there was no willows close in there?

A. No.

Q. You are sure of that? A. Yes.

Q. And so you think your lights would be visible through there coming down the road?

A. Yes, they would be absolutely because I could see his lights for some distance. [33]

Q. Now, getting back just a minute to this soldier there that talked to you, after he talked to you, what did he do?

A. He drove down the road.

Q. And you saw his car going down the road and disappear out of sight? A. Yes.

Q. Where is your home?

(Testimony of Titus Corbett.)

A. Kooskia, Idaho.

Q. Are you a Tribal Indian? A. Yes.

Q. And what Tribe? A. Nez Perce.

Q. Is your wife a Tribal Indian? A. Yes.

Q. Same Tribe? A. Yes.

Q. Where had you been? A. At Celilo.

Q. What were you doing at Celilo?

A. We were looking for the mother of the boy to take him, to see the mother of the boy.

Q. And you had been going back at what time?

A. Ten o'clock.

Q. Ten o'clock in the morning? [34]

A. No, ten o'clock previous to the accident.

Q. Ten o'clock in the evening, that evening?

A. Yes.

Q. Was there a celebration there?

A. No.

Q. What was the nature of it?

A. Just a carnival.

Q. Was it a carnival or rodeo?

A. Just a carnival right outside of town.

Q. How many people were with you?

A. Five other people besides me.

Q. There was your wife and Miss Wilson, is that right? A. Yes.

Q. And the Franks?

A. And Miss White and Whitaker.

Q. Now, how did you stay so long in Golden-
dale; what were you doing so long in Goldendale?

A. We were—

(Testimony of Titus Corbett.)

Mr. Felton: If the Court please we object to that as immaterial.

Mr. Brown: Q. What were you doing in Goldendale; what were they doing?

Mr. Felton: If the Court please, we object to this.

The Court: Objection overruled.

A. We were taking in the carnival. [35]

Mr. Brown: Q. And you left Goldendale about what time?

A. Ten o'clock. Oh, you mean Goldendale?

Q. Yes.

A. The carnival closed at midnight and we left then.

Q. Where were you headed for?

A. To the ferry.

Q. And you did not go to any other place in Goldendale? A. No.

Q. And then the girls got out of the car?

A. Yes.

Q. None of the men got out? A. No.

Q. As a matter of fact, hadn't your wife and you had an argument? A. No.

Q. And hadn't she refused to get back in the car? A. No.

Q. And hadn't you all got out for a while?

A. No.

Q. Had you seen her lying on the road for a while? A. Did I see her lying on the road?

Q. Yes. A. No, I did not.

Q. Did you walk along the road? [36]

(Testimony of Titus Corbett.)

A. Did I walk along the road?

Q. Yes. A. After the accident?

Q. Yes.

A. No. I did not at that time, I made no trip along the road.

Q. When did you?

A. Two weeks after the accident.

Q. Do you recall that you picked up your wife's shoe on the highway?

A. Did I pick up the shoe of my wife on the highway?

Q. Yes.

A. No, I did not pick it up. It was lying in the ditch along side of her.

Q. Oh, you didn't see somebody pick it up and put in over there? A. No.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.) [37]

MARTHA CORBETT,

a plaintiff herein, called and sworn as a witness on her own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. Your name is Martha Woods Corbett, is it?

A. Yes.

Q. Now, you will have to speak up a little bit

(Testimony of Martha Corbett.)

because we all have got to hear you, and no matter what your inclination is, you have to speak up.

A. Yes.

Q. Where do you live, Mrs. Corbett?

A. Kooskia, Idaho.

Q. How long have you lived there?

A. Ever since I have been married.

Q. And how long has that been?

A. Five years.

Q. How old are you, Martha?

A. Twenty-six.

Q. And prior to September 9th, 1945, you had been working for a couple of years, had you?

A. Well, I had been working almost all the time I was married.

Q. And where were you working after you were married?

A. Well, before the accident I had been working in [38] Portland.

Q. And where at in Portland?

A. Albina Engine and Machine Works.

Q. And what was your position there?

A. Welder.

Q. And that was in the shipyards, was it?

A. Yes.

Q. How long were you working there?

A. Oh, it must have been about eighteen months.

Q. And what did you make while you were working there?

A. Well, we welded on the ships.

(Testimony of Martha Corbett.)

Q. Well, I mean, how much money did you make, is what I am talking about?

A. Well, an average of fifty to seventy-five a week.

Mr. Brown: If the Court please, I renew my objection to this line of testimony so I do not have to keep interrupting.

The Court: The record may show that your objection goes to all this line of testimony.

Mr. Felton: Q. How much did you get an hour there? A. \$1.20.

Q. And your fifty or seventy-five dollars a week we are talking about is how much an hour?

A. Well, that would be just an overage.

Q. You got \$1.20 an hour? [39]

A. Yes.

Q. How many hours did you usually work in a day?

A. Well, I worked eight hours a day.

Q. And how many hours a week?

A. Well, for about five months or so I worked seven days a week.

Q. There was some overtime connected with this was there? A. Quite a bit.

Q. And how much did you get for overtime?

A. I got time and a half and double time on Sundays.

Q. And before you worked at Portland where did you work? A. Down at San Diego.

Q. And what were your wages there?

A. Ninety-five cents an hour.

(Testimony of Martha Corbett.)

Q. And how many hours a day did you work there? A. Eight hours.

Q. And what were you doing there in San Diego? A. I was a riveter in the aircraft.

Q. And how many hours a week did you work down there?

A. Well, I just worked six days a week down there.

Q. And how many hours a day, did you say; eight? A. Eight hours a day.

Q. And it was time and half for overtime down there, was it? [40] A. Yes, on Saturdays.

Q. Now, at the time on September 8th, 1945, that is, calling your attention back to the time you went to Goldendale, do you remember getting in the car and coming from Goldendale with your husband and these other people we have been talking about? A. When we left Goldendale?

Q. Yes. A. Yes.

Q. What was your position in the car from Goldendale?

A. Well, three men were in the front and three of us were in the back.

Q. The three men in the front and the three women in the back, is that true? A. Yes.

Q. And did you stop on the highway someplace? A. No.

Q. I mean just before the accident, did you stop? A. No.

Q. Well, now, your car stopped down there before you got out, didn't it?

(Testimony of Martha Corbett.)

A. Oh, it stopped, yes, do you mean when we——

Q. You misunderstand me. You stopped the car on the highway and you and the other women got out of the car, did you? [41]

A. Yes.

Q. What was the purpose of that stop?

A. Well, we had to go to the toilet.

Q. In other words, you had to attend to the calls of nature?

A. Yes.

Q. What other people got out of the car with you?

A. Jane and Rachael.

Q. That is Jane White and Rachael Wilson?

A. Yes.

Q. And where did you go after you got out of the car?

A. We walked up the highway.

Q. How far, do you know?

A. Oh, it wasn't very far, I couldn't say.

Q. Two or three hundred feet?

A. Oh, about a couple of hundred feet, I guess, down there.

Q. Which side of the highway did you go up?

A. When we were going back to the car?

Q. No, when you were going away from the car, when you first got out?

A. Well, we walked on the same side as the car, right behind it.

Q. And after you attended to the calls of nature which side of the road were you on? [42]

A. We cut over.

Q. Did one of the men go with you after you attended to the calls of nature?

A. He was already over there.

(Testimony of Martha Corbett.)

Q. Who was it? A. Levi Frank.

Q. Then, what did you do?

A. Well, we started walking back to the car.

Q. Tell the Court how you started walking.

A. Well, Rachael was in front—

Q. Speak up. Go ahead.

A. Rachael was in the lead and Jane was right behind her and I was third and Levi was walking directly behind me.

Q. And where were you walking; was it on the black top or the shoulder?

A. Walking on the gravel.

Q. Did you ever walk on the black top excepting crossing over?

A. Just when we crossed over.

Q. When did you first see this car that hit you?

A. Well, we just seen the car lights coming.

Q. Now, from the time you first saw it until you landed in the ditch, will you tell the Court as well as you can what happened?

A. Well, I just remember seeing the car lights coming [43] and I heard somebody say a car was coming and I turned around to see where Levi was and he was behind me, and when I came to I was lying in the ditch

Q. At that time you are sure that you were on the shoulders of the road? A. Oh, yes.

Q. And when you came to where were you?

A. I was what?

Q. When you came to where were you?

A. I was lying in the ditch.

(Testimony of Martha Corbett.)

Q. And where was Levi?

A. I couldn't see him.

Q. And who came there?

A. Nobody was there until one of the girls hollered for my husband and he came down.

Q. Do you remember what happened after you were hit?

A. Well, I remember turning around to see where Levi was and then I was in the ditch.

Q. Do you remember how you were hit or what happened to your foot of any kind?

A. Well, I guess it was run over.

Q. Well, you guess it was, but you don't have any remembrance of what happened?

A. Well, I guess I was knocked out for a while.

Q. And then your husband came up and could you look at [44] your foot?

A. No, my back was hurt.

Q. You did not look at your foot?

A. No, they wouldn't allow me to see it.

Q. How long did you stay in that ditch?

A. It must have been two hours, it must have been quite a while.

Q. And who came down with you and stayed with you? A. My husband.

Q. And did Mr. Wilkerson ever come down in the ditch where you were?

A. Nobody else came down.

Q. And then you were taken in the ambulance to The Dalles? A. Yes.

Q. And you went to the hospital, did you?

(Testimony of Martha Corbett.)

A. Yes.

Q. How long did you stay at the hospital?

A. Six weeks.

Q. If you experienced any pain, tell the Court about it.

A. Well, it was pretty terrible. I don't believe I could describe it.

Q. Well, as well as you can. How long did it last?

A. Well, from the time I was hurt. I guess most of the time while I was in the hospital. [45]

Q. Now, before you had this accident, what was your physical condition?

A. I was in perfect health.

Q. Had you ever had any sickness or anything to interfere with your physical condition?

A. No.

Q. Had you ever had any injuries to your foot and back? A. No.

Q. When you first got out of the hospital did you use crutches? A. Yes.

Q. And for how long a time?

A. It must have been about five months, not quite.

Q. Did they operate upon your foot?

A. Yes.

Q. How many times? A. Twice.

Q. At the present time do you wear any mechanical aid? A. Yes, I have a foot brace.

Q. What is it?

A. (Witness exhibits foot.)

(Testimony of Martha Corbett.)

Q. Swing around so that the Judge can see it. Will you take off your mechanical aid and your shoe so that the Judge can see your foot.

The Court: Do you wish to come up and see the lady's [46] foot, Mr. Brown?

Mr. Felton: Q. And where does the cut run?

A. Well, it must be right around here.

Q. And is this new skin here? A. Yes.

Q. And how many operations did you have on that foot? A. Two.

Q. And at the present time why do you wear this mechanical aid?

A. Well, to keep my foot from going forward because the tendons are injured and they won't hold.

Q. Is that the reason for this piece of metal under the heel of the brace? A. Yes.

Q. Are you able to walk without that mechanical brace?

A. No, I have been wearing that mechanical brace all the time.

Q. And what do you do when you sleep?

A. I always put a pillow at the foot of the bed so that my foot is held up.

Q. And the toes are held up towards the knee, is that it? A. Yes.

Q. And if you don't do that what happens?

A. Well, it has a tendency to twitch too much.

Mr. Felton: Now, put on your shoe.

The Court: I have finished my inspection.

(Testimony of Martha Corbett.)

Mr. Felton: Q. Now, do you know how much skin graft was drawn on that foot?

A. I remember the doctor saying——

Q. No, not what he said. If you don't know, don't testify to it. Now, you have still some difficulty with your back; I believe you testified to that?

A. Oh, yes, I have.

Q. And how is that?

A. Well, it makes me awfully tired and it aches a good deal and when I am lying down I can't turn directly over and I have to brace myself with hands and elbows.

Q. And what happens at nights?

A. It aches.

Q. Do you use anything else?

A. A hot water bottle.

Q. I mean, do you use anything to brace your back?

A. No, I use a hot water bottle.

Q. Does this restrict your activities?

A. Yes.

Q. Tell the Court what it is.

A. I haven't been able to do any housework.

Q. Are you able to work at welding or mechanical work at all? [48]

A. No.

Q. Can you do any of that work at all?

A. No. Very little.

Mr. Felton: You may inquire. Wait a minute, I forgot just one question. Q. Did you accumulate any doctor bills by reason of the accident?

A. Yes.

(Testimony of Martha Corbett.)

Q. Where?

A. The The Dalles General Hospital.

Q. And how much was the doctor and hospital bill?

Mr. Brown: Have you got a bill. That would be the best evidence.

A. We haven't got our receipts with us.

Mr. Felton: Q. Do you know how much the bill was? A. Not exactly.

Q. It was something over \$700.00?

Mr. Brown: Object to that.

Mr. Felton: I will withdraw that question. Go ahead.

Cross Examination

By Mr. Brown:

Q. How long between the time that you got out of the car and the time of the accident?

A. How long was it?

Q. Yes, between the time that you got out of the car and the time that the automobile hit you?

A. It couldn't have been very long because, oh, it was approximately eight or ten minutes or so.

Q. Does this look at all familiar to you? (Indicating on map). When you first got out of the car your husband was parked on the shoulder on the side of the road?

A. Yes, when I first got out.

Q. Did you ever see your car move?

A. We never paid any attention to it, we were walking up the road.

(Testimony of Martha Corbett.)

Q. You didn't see your husband move the car, did you? A. No.

Q. At any time, did you? A. No.

Q. And didn't this other man get out of the car shortly after you did and follow back after you up the road?

A. I didn't see him get out but he must have got off because when we walked across the highway he was already over there.

Q. Wasn't he helping you to walk along when you were hit? A. What is that?

Q. Wasn't he helping you to walk along when you were hit by this car?

A. No, I was walking by myself.

Q. Before this car came from the west there was another car that came from the other direction wasn't there; and they [50] talked to you?

A. No.

Q. Do you remember seeing two soldiers and they talked to you? A. No.

Q. At any time that evening?

A. There wasn't anybody.

Q. Do you remember lying down in the middle of the highway?

A. I didn't lie down in the middle of the highway.

Q. At any time? A. No.

Q. And it is your testimony that you were on the gravel portion at all times?

A. When we were walking up to the car, yes.

Q. When you were walking up to the car?

(Testimony of Martha Corbett.)

A. Yes.

Q. You never did step off of the gravel portion?

A. No.

Q. You weren't on the black top at all, is that right?

A. When we walked across the highway we were, yes.

Q. I think you said there were two girls walking ahead of you, were there? A. Yes.

Q. And they were directly ahead of you, were they? [51] A. Yes.

Q. And this automobile didn't touch them, did it? A. It hit both of their hands.

Q. It hit their hands? A. Yes.

Q. But it hit you solidly and hit Mr. Frank solidly? A. Yes.

Q. And they were walking ahead of you?

A. Yes.

Q. You admit that? A. Yes.

Q. And Mr. Frank didn't have his arm around you holding you? A. No.

Q. You weren't walking in the middle of the road when these two soldiers came up and stopped?

A. No.

Q. You don't recall them at all?

A. No, there was no soldiers talking to us.

Q. No soldiers were there talking to you before the accident? A. No.

Q. Now, I don't want to embarrass you but we want the truth about it. It is your testimony that there was no soldiers there talking to you? [52]

(Testimony of Martha Corbett.)

A. They didn't talk to us.

Q. Oh, you knew that they were there?

A. I didn't see them.

Q. You didn't see two soldiers? A. No.

Q. And do you remember them saying to get out of the road or you would be killed; don't you remember that? A. No.

Q. They came up to you and told you to get out of the road or you would be killed? A. No.

Q. As a matter of fact, you don't remember much about that evening, do you?

A. Sure I do.

Q. You don't remember much about leaving Goldendale? A. Sure I did.

Q. About leaving Goldendale?

A. Yes, sure, we left after the carnival was over.

Q. And your husband's car stopped and you got out of the car on the road, and how far back of the car did you go? A. It wasn't very far.

Q. Didn't you testify that it was one hundred yards or so that you walked back?

A. Well, that isn't very far.

Q. Well, you walked back one hundred yards, you say? [53] A. Yes.

Q. You walked back on the side of the road?

A. Yes.

Q. It was dark, wasn't it? A. Yes.

Q. Very dark? A. Yes.

Q. Why did you walk so far back on the high-

(Testimony of Martha Corbett.)

way, one hundred yards; isn't that a city block in your mind? Why did you go so far back?

A. Because I had to.

Q. Now, as a matter of fact, you and your husband had been quarreling in the car, hadn't you?

A. I wouldn't call it a quarrel.

Q. Well, tell the Court what it was you were arguing with each other about?

A. It wasn't an argument. It was a discussion. We weren't arguing.

Q. What about?

A. We were discussing the matter of whether we should go clear to Pendleton or stay at Celilo until my sister got back.

Q. And you got mad and got out of the car, is that right? A. No. [54]

Q. And started walking to Goldendale and these girls followed and Mr. Frank followed you?

A. I got out for another purpose.

Q. And you didn't talk to the soldiers at all? Now, do you remember seeing these two soldiers in uniform there that evening at any time?

A. No.

Q. Would you say they weren't there and didn't talk to you at all?

A. They didn't talk to me.

Q. And don't you remember that you were afraid that they were policemen and told them to go on about their business; don't you remember telling the two soldiers that, the two men in uniform?

A. I didn't see any soldiers.

(Testimony of Martha Corbett.)

Mr. Brown: You didn't see them? That is all.

Redirect Examination

By Mr. Felton:

Q. And, then, you got out of the car to attend the call of nature, didn't you? A. Yes.

Q. And that was the reason you went up the road so far because it was an open road?

A. Yes. [55]

Mr. Brown: Object to counsel leading her so much.

The Court: It is leading.

Mr. Felton: That is all.

(Witness excused.)

LOTTIE FRANK

a plaintiff herein, called and sworn as a witness on her own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. And your name is Lottie Frank, is it not?

A. That is right.

Q. And your late husband's name was Levi Frank? A. Yes.

Q. And where do you live, Mrs. Frank?

A. Kooskia, Idaho.

(Testimony of Lottie Frank.)

Q. And do you and your husband have any children?

A. No. None of our own. We had two of my brothers. We raised one from a baby.

Q. And are you the administratrix of your husband's estate? A. That is right.

Q. And where were you appointed?

A. At Grangeville.

Q. And you still are Administratrix of your husband's [56] estate? A. Yes.

Mr. Brown: You didn't put any petition or order or copy of them in.

Mr. Felton: Yes, I have.

Mr. Brown: I would like to see it. Pardon me, just a minute, I didn't want to object but I want to know about this.

Mr. Felton: That is the testimony I want out of this witness at this time. I want to call her for purely damage features later on so that my case may be in rotation. I will put those in if you wish.

Mr. Brown: No, she testified.

Mr. Felton: You may inquire.

Mr. Brown: No questions.

Mr. Felton: You see, I want to recall her, your Honor.

The Court: You may recall her later.

Mr. Brown: No questions.

(Witness excused)

JANE WHITE

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Your name is Jane White? [57]

A. Yes.

Q. And where do you live?

A. Kooskia, Idaho.

Q. How old are you? A. Thirty-eight.

Q. And were you with these people on September 8th and 9th, the time we have been hearing about in the testimony here?

A. Yes, I was.

Q. And were you in the car when it left Golden-dale and pointed for The Dalles?

A. Yes, I was.

Q. Do you remember approaching and stopping at this place on the highway that we have been talking about? A. Yes.

Q. Tell the Court what happened at the time the car stopped on the highway and you girls got out; what happened there?

A. We got out and went back behind the car. I don't know just exactly how far we went. After we were coming back to our car we crossed the highway to the river side and walked back up to our car.

Q. And at the time you crossed the highway and started back to your car, how far were you behind your car? A. We were—— [58]

(Testimony of Jane White.)

Q. I mean, how many feet, if you can judge it?

A. I would say one hundred.

Q. You heard the patrolman testify. Was he approximately correct, according to your remembrance?

A. Well, I wouldn't know just how far it is, one hundred or two hundred feet.

Q. Then, when you were walking on the highway where were you?

A. We were off on the side, off of the pavement, we were on the gravel.

Q. And you were not on the black top?

A. No, we were not.

Q. And when did you first see Mr. Wilkerson's car approaching?

A. Well, we were walking, we were about half-way back to the car, I imagine.

Q. And how were you walking; who was in front and so on?

A. Rachael Wilson was in front and I was next and Martha next and Levi. We were walking single file.

Q. And at the time you saw Mr. Wilkerson's car approaching, just tell the Court what happened there at that time?

A. Well, we were just walking. Of course, we didn't think anything about it. We were real careful of not getting run over or anything like that and it was coming so fast that before I knowed it, it happened. [59]

Q. And what happened?

(Testimony of Jane White.)

A. Well, Rachael was walking ahead and I turned around, I turned back and those two people were gone.

Q. And the car hit you?

A. Yes, it cut my thumb.

Q. Which thumb?

A. The right one, the right side.

Q. And were you looking towards the car coming towards you? A. Right.

Q. And it hit your thumb and passed?

A. Yes.

Q. Now, you were walking on the highway, and how did you walk?

Mr. Brown: Objected to.

The Court: Objection sustained, as leading.

Mr. Felton: (Q.) And as soon as the car passed, you say, you turned and looked for the other two? A. Yes.

Q. Where did you see them?

A. Well, they were gone.

Q. You saw them later? A. Yes.

Q. Where?

A. They were both in the ditch. [60]

Q. Tell the Court how they were lying in the ditch.

A. Well, there was Mrs. Corbett lying kind of on the ditch and her head was down and Levi was further up closer to the road with his head towards the road.

Q. Did Levi ever make any movement at all?

A. Never.

(Testimony of Jane White.)

Q. Did one of your members make a noise, yell for somebody or scream? A. Yes.

Q. Which one? A. I believe I did.

Q. What? A. I believe I did.

Q. And how long did you stay in that place?

A. After the accident?

Q. Yes.

A. I must have been there about two or three hours.

Q. And did you see Mr. and Mrs. Wilkerson there around there at any time?

A. No, I didn't. I guess I was so upset, I didn't notice them.

Q. Where did you stay?

A. I stayed with Levi.

Q. Did you know he was dead at that time?

A. What? [61]

Q. I say, did you know he was dead?

A. (witness cries)

Q. I know that this is hard to do but keep on going, will we. When did you first find out that Levi was dead?

A. Well, just about right away.

Q. And you stayed with him there until they took him away, did you?

A. Yes, I did.

Q. And did he ever make any sound or outcry or anything of that nature?

A. No, he didn't.

Q. Who was with Martha?

A. Titus was, her husband.

(Testimony of Jane White.)

Q. How did you get back to Celilo?

A. I don't know, somebody took us.

Q. You heard on cross examination about some soldiers there. Did you see some soldiers there?

A. No, I didn't see no soldiers there.

Q. You three girls were together all the time, were you? A. Yes.

Q. You heard some cross examination about Martha lying down in the middle of the road, didn't you? A. Yes, I did.

Q. Did you see any such thing? [62]

A. No, I didn't.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. You say that Miss Wilson was ahead of you walking back to the car, is that right?

A. That is right.

Q. And you were next, is that right?

A. Yes, unhuh.

Q. And then, Mrs. Corbett and then Levi.

A. Yes.

Q. Now, when did Levi join you back of the car there?

A. Just a few minutes after we got out.

Q. Well, you had been out of the car for some-time, had you?

A. It didn't seem very long.

Q. Was the car parked down here or up here

(Testimony of Jane White.)

(pointing on map)? That is, when you got out of it?

A. It was parked up there.

Q. Above the car here?

A. When we got out of the car?

Q. Yes. Isn't it a fact that he just pulled along side of the road and you got out of the car?

A. Well, he pulled off of the road. I don't know whether he ever moved or not. [63]

Q. Well, you recall seeing your car move after the accident, don't you? A. No, I don't.

Q. You don't remember that?

A. No, I don't.

Q. And you were clear on the shoulder, you say, when you were walking along?

A. That is right.

Q. And that shoulder, the witness said, is three feet; is that about right? A. Yes, three feet.

Q. And how wide would you say this ditch is?

A. About two or three feet.

Q. About the same width of this shoulder.

A. Yes, about.

Q. And you were clear off on the shoulder?

A. Clear off of the hard road.

Q. And this car hit you on the thumb?

A. Yes, that is right.

Q. And was this thumb treated by any doctor?

A. Well, they taped it at the hospital at The Dalles.

Q. And you were going along there and do you know what part of the car hit you?

(Testimony of Jane White.)

A. I don't know what part of the car hit me, it was coming so fast. [64]

Q. And Miss Wilson was directly in front of you? A. Yes.

Q. And was she also on this three foot portion of the road? A. Yes.

Q. And the other two were in back of you?

A. Yes.

Q. And all three on the shoulder?

A. Yes.

Q. And after the accident do you recall anybody talking to you about it?

A. After the accident?

Q. Yes. Almost immediately after the accident?

A. Talking to me about the accident?

Q. Yes. Do you remember Mr. Corbett—Titus Corbett, isn't that his name, Titus Corbett?

A. Yes.

Q. Do you remember him coming down to where his wife was lying?

A. Yes, I remember him coming down.

Q. Who was with him?

A. Nobody was with him.

Q. Absolutely no one?

A. Well, I just heard him. There was a voice and I wasn't paying any attention. [65]

Q. It was so dark you couldn't see, is that right?

A. Well,—

Q. Isn't that right?

A. Well, it was pretty dark.

(Testimony of Jane White.)

Q. And there were no car lights or lights there in that place? A. No.

Q. Who was left in the car after Levi got out?

A. Just Titus Corbett and Roy Whitaker.

Q. And who? A. Roy Whitaker.

Q. Whitaker? A. That is right.

Q. Is he in court? A. That is right.

Q. Is here here now? A. Yes.

Q. Which one? They were left in the car?

A. Yes.

Q. Now, had there been a fight or argument in the car before you stopped?

A. No, there wasn't.

Q. No disagreement of any kind?

A. No.

Q. They were all perfectly friendly? [66]

A. That is right.

Q. And Titus and his wife hadn't gotten into an argument. A. No, they didn't.

Mr. Brown: That is all.

Redirect Examination

By Mr. Felton:

Q. Did anyone ever ask or make inquiry as to who was injured, or whether they could help or not?

A. No.

A. Any of the white people in the car?

A. No. I don't know of it. I was very upset. I don't remember of anything.

Q. You have known Levi and his wife for a long time? A. That is right.

(Testimony of Jane White.)

Q. How long have you known them?

A. Well, all of my life.

Q. Where do you live?

A. Kooskia, Idaho.

Q. And they lived there? A. Yes.

Q. How did they get along together?

A. Perfectly very well.

Mr. Brown: Objected to.

The Court: She may answer. [67]

Mr. Felton: (Q.) How did they get along to-

gether? A. Very well.

Q. And what sort of person was Levi?

The Court: I didn't understand that.

Mr. Felton: The damage feature.

The Court: You may answer.

A. He was very nice and good person and very industrious.

Mr. Felton: (Q.) Did he drink?

A. No, he didn't.

Q. Did he work? A. Yes.

Q. What did he work at?

A. He was a logger and worked in the logging camps.

Q. And how much of the year did he work?

A. He didn't work steadily. He worked four or six months of the year and he would take care of the ranch too.

Q. What relation are you to Lottie Frank here?

A. She is my sister.

Q. And you live at Kooskia also?

A. Yes, I live in Kooskia.

(Testimony of Jane White.)

Q. And Titus had a ranch up the river there?

A. Do you mean Levi?

Q. Yes, Levi? A. Yes. [68]

Q. Where was that?

A. That was five miles up from Kooskia.

Q. What kind of ranch was that?

A. Just a little truck ranch.

Q. What did Levi do with his money?

A. Well, he supported the family.

Q. Did he take good care of them?

A. Very good.

Q. What kind of home did he provide for them?

A. Nice home.

Q. Has your sister got any other support?

A. Well, my mother is staying with her.

Q. On her own; has she got any other money?

A. No, not that I know of.

Mr. Felton: That is all.

Recross Examination

By Mr. Brown:

Q. You are a Tribal Indian, are you?

A. What?

Q. Are you a Tribal Indian? A. Yes.

Q. You are of the Tribal Indians?

A. Yes.

Q. You have your Tribal funds?

A. Yes. [69]

Q. For the Nez Perce's? A. Yes.

Mr. Brown: That is all.

(Testimony of Jane White.)

Re-direct Examination

By Mr. Felton:

Q. Now, you have got the words "Tribal funds" here among the Nez Perces. Is there any Tribal funds?

A. I don't know anything about it. Some people own lands, own ranches.

Q. I know that the Tribe itself doesn't have any money? A. No.

Q. And the Tribe itself doesn't give you any money because you are a Tribal Indian, does it?

A. No.

Mr. Felton: That is all.

(Witness excused.)

The Court: I think the Court will recess at this time, before you call another witness, until one-thirty.

Afternoon Session, Wednesday, May 8, 1946, 1:30
o'clock, p. m.

RACHAEL WILSON

called and sworn as a witness in behalf of the plaintiffs, testified as follows:

Direct Examination

[70]

By Mr. Felton:

Q. And your name is Rachael Wilson, is it not?

A. Yes, it is.

(Testimony of Rachael Wilson.)

Q. And where do you live, Miss Wilson?

A. I live at Kamiah, Idaho.

Q. Are you one of these Tribal Indians that counsel for the defendant has been talking about?

A. Yes.

Q. And what education have you?

A. I have had two years of college.

Q. Do you know Lottie Frank?

A. Yes, she is my first cousin.

Q. And do you know the other plaintiffs here, Mr. and Mrs. Corbett? A. Yes, I do.

Q. Are they any relation to you?

A. No, they are not.

Q. Were you with them on the night of September 8th and the morning of September 9th?

A. Yes, I was.

Q. And did you go with them to Goldendale?

A. Yes.

Q. And you heard the testimony here that coming back from Goldendale and stopped on the Northside Highway, it is called? [71]

A. Yes.

Q. And when you stopped what did you girls do?

A. Well, we had to get out—well, nature was calling and so we got out.

Q. Go ahead and tell what happened.

A. We walked behind the car and we walked back down the road and when that was finished we walked back to the car, and Levi was there and he started walking back with us, and we were in single file and I was in the lead, and Jane was

(Testimony of Rachael Wilson.)

with us and then Martha, and Levi was the last one coming behind us.

Q. What part of the highway were you on?

A. We were on the river side on the gravel because——

Q. You heard the state patrolman testify to the fact that there was black top and then the gravel shoulder? . . . A. What is that?

Q. Black top and gravel shoulder there?

A. Yes.

Q. Was it the shoulder you were walking on?

A. Yes, we were on the shoulder.

Q. Were any of you on the black top?

A. No.

Q. When did you first see Mr. Wilkerson's car approaching?

A. Well, I saw the car coming but I figured we were far [72] enough off of the road and I figured that we would be all right, and——

Mr. Brown: If the Court please, we object to this volunteer testimony, and move to strike it out.

The Court: The motion to strike will be granted. She should state what happened at the time they were walking there.

Mr. Felton: (Q,) You heard the patrolman testify as to there being some hill there?

A. Yes.

Q. Did you see the car coming as it came over the hill? . . . A. Yes.

Q. And from the time it approached and until it hit you, what happened, if it did hit you?

(Testimony of Rachael Wilson.)

A. Well, I just saw the car coming and we were on the gravel, and I thought we were clear out of the way for the car to come near us and the first thing I knew my hand flew back.

Q. Was your hand hit? A. Yes.

Q. And was it hit hard?

A. Yes, it was broken.

Q. Where was it broken?

A. Up above this joint.

Q. In other words, you are pointing to the joint of [73] your first finger, and that is pretty well on the upper part? A. Yes.

Q. It is where the first finger joins the hand?

A. Yes.

Q. That is on your right hand?

A. Yes.

Q. What happened to the rest of your companions?

A. Well, I turned around and I saw Jane standing there and the rest of them were down there and I could hear "Mart" moaning down there, and just as I turned around I heard Jane call Titus.

Q. And then what did you do?

A. I walked down to where Levi and "Mart" was.

Q. And where were Levi and Martha?

A. Martha was down in the willows and Levi was lying with his head towards the highway.

Q. Did you look at his legs? A. Yes.

Q. What did you see?

(Testimony of Rachael Wilson.)

A. Well, this leg was across this way (illustrating).

Q. Which leg? A. This leg.

The Court: If you will indicate which leg you are referring to, whether the right or the left, the reporter can get it in his notes. [74]

A. It was the right leg.

Mr. Felton: (Q) It was his right leg, and did it tear at a joint or between joints?

A. Well, I really—all I looked at was his right leg for a while which was over his left leg.

Q. Crossed over? A. Yes.

Q. Did he say anything or do anything?

A. No, he didn't.

Q. How long was it before you ascertained that he was dead?

A. Well, we never figured he was dead then. We tried to talk to him and say something to him but he didn't talk and Jane was there with him.

Q. And where was Martha?

A. She was in the ditch.

Q. Did you go down to where Martha was?

A. Well, I just went down to look and came back because it was such an awful thing.

Q. Could you see her foot?

A. Well, I could see the blood and "Ty" had a flashlight.

Q. How was her foot?

A. Well, I could see the blood and that was all I wanted to see.

(Testimony of Rachael Wilson.)

Q. Did you see Mr. Dickerson—pardon me, the name is [75] Wilkerson.

A. No, I never did see him.

Q. Did he come down where Martha was, at all?

A. I never did see him go anywhere near her.

Q. Do you know how many people were in this death car?

A. No, I don't know how many people.

Q. Did you see where the car went to?

A. Well, I saw it parked down on the left side of the road facing Goldendale.

Q. Now, you heard some cross examination about some soldiers being around there. Did you see any soldiers around there?

A. There was positively no soldiers talking to us.

Q. Do you know when they moved the car that you got out of before they went down the road?

A. No, because we had gotten out of the car when they moved out.

Q. How did you get to The Dalles after the accident was over?

A. What is that?

Q. How did you get to The Dalles after the accident?

A. Well, a patrolman took us there.

Q. Mr. Hyland?

A. No, I don't remember whether it was or not.

Q. Some patrolman took you? [76]

A. And he took us on account of Jane's hand

(Testimony of Rachael Wilson.)

was cut badly and she had to have medical attention.

Q. Your hand was treated later?

A. A week later.

Q. How badly was Jane's hand hurt?

A. It was cut there. (indicating)

Q. You are talking about the right thumb where it joins on to the hand? A. Yes.

Q. Is that where you are talking about, the thumb on the right hand? A. Yes.

Q. We are trying to keep a record here so that the court reporter's record is good and we can put it into words. Now, you say that Lottie is your cousin? A. Yes.

Q. And did you know Levi.

A. Yes, quite well.

Q. And have you visited there at their home?

A. Yes.

Q. Where do they live?

A. Kooskia, Idaho. They have a ranch five miles up the river from Kooskia.

Q. What kind of ranch do they have up there?

A. Well, they have their own garden and they had a [77] lot of cattle at one time.

Q. And did Levi work? A. Yes, he did.

Q. How steadily?

A. About six months of the year because he had to take care of putting in the garden.

Q. And where did he work?

A. He was a logger.

Q. Was he industrious?

(Testimony of Rachael Wilson.)

A. Yes, he was.

Q. How old was he at the time of his death?

A. I think he was thirty-five years old. I couldn't say for sure.

Q. And what did his family consist of?

A. Well, there was his wife and then they have—well, her mother is there and she was taking care of two little girls for her brother.

Q. What did Levi do with his money that he earned?

A. He gave it all to his wife.

Q. In other words, he took care of his family with it? A. Yes.

Q. And does Lottie have any income of her own?

A. No.

Q. Was she dependent upon her husband for support, then? A. Yes. [78]

Q. At the time of his death was Levi a drinking man or a sober man?

A. No, he was a sober man.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Didn't he have anything at all to drink that day? A. No, he never did.

Q. Not a thing? A. Not a thing.

Q. And you did not? A. No.

Q. You hadn't had a thing to drink?

A. No, I hadn't that day.

(Testimony of Rachael Wilson.)

Q. And, yet, you didn't see two soldier some-time before the accident?

A. There was positively no soldiers talking to us.

Q. Did you see any soldiers there in the vicinity?

A. No, I didn't.

Q. You didn't see them just prior to the accident? A. No.

Q. Well, was there a car that drove up prior to the accident and stopped?

A. Well, there might have been to tell them to move [79] out of the highway that had before but they never talked to us, there was no soldiers talking to us.

Q. I couldn't get that. There might have been that told who to move out of the highway?

A. There was no soldiers talking to us.

Q. You first said there might have been someone that told them to move out of the highway, is that right?

A. I was talking about the car.

Q. Now, you and Jane and Martha were over in the center of the highway for a while?

A. No, we walked across the highway to come back up the right side for pedestrians to be walking on.

Q. Now, this car of yours, was it moved right after the accident or before?

A. It was moved right after we got out of the car and then they pulled away.

(Testimony of Rachael Wilson.)

Q. It was moved just after you got out of the car?
A. Yes.

Q. Who was left in the car?

A. There was Roy Whitaker and Titus Corbett.

Q. As a matter of fact, didn't Titus Corbett slump over and go to sleep when you got out of the car?
A. Who; Titus?

Q. Yes.

A. No, he didn't, I wasn't there. [80]

Q. As you walked up the highway you say you were in the lead?

A. When the accident happened?

Q. Before the accident happened?

A. Oh, before the accident happened?

Q. Is that true; you were in the lead?

A. Well, —

Mr. Felton: I think she is confused over which time you are talking about.

Mr. Brown: Q. When you were returning to the car just before the accident.

A. When we were returning to the car?

Q. Yes. You were in the lead?

A. Yes, I was in the lead.

Q. And you say you were on the three-foot shoulder, is that right?
A. Yes.

Q. And just back of you was Martha, is that right?

A. No, Jane was just back of me.

Q. And back of Jane was Martha, is that right?

A. Yes.

Q. And back of Martha was Levi?

(Testimony of Rachael Wilson.)

A. Yes.

Q. Now, how did you know that they weren't on the road, you were in the lead? [81]

A. I would look back once in a while to see.

Q. Oh, you were looking back from time to time? A. Sure.

Q. Now, how far apart were you as you walked up the road?

A. Well, we were just right behind each other.

Q. Now, isn't it a fact that Levi and Martha were about the center of the road and he was supporting her coming up there?

A. They were not.

Q. You are sure of that too, aren't you?

A. I am sure of that.

Q. And after the accident you didn't talk to a soldier there?

A. I was so shocked after the accident I don't know.

Q. By the way, have you taught school?

A. No.

Q. Did you tell them that night that you were a school teacher?

A. I told the patrolman.

Q. Did you tell anyone there?

A. The patrolman.

Q. Did you?

A. The patrolman because I talked to him.

Q. Who did you tell? [82]

Mr. Felton: Now, wait a minute——

Mr. Brown: Just answer the question.

Mr. Felton: Now, don't answer until I object.

(Testimony of Rachael Wilson.)

Mr. Brown: Q. Who did you tell that you were a school teacher?

Mr. Felton: If the Court please, we object to this as improper cross examination, and if it is an impeaching question the ground of impeachment isn't laid.

Mr. Brown: If you Honor please, this is part of the *res gestae* and I want to show who she did talk to, whether the witness talked to the patrolman.

Mr. Felton: The patrolman didn't come until two hours after the accident and it isn't part of the *res gestae*.

Mr. Brown: Now, she admits that she talked to some man and told him she was a school teacher.

The Court: If you wish to lay the ground for the impeachment, you should fix the time and place and persons present.

Mr. Brown: Q. All right, immediately after the accident you were talking to someone and you told him you were a school teacher.

Mr. Felton: That isn't an impeaching question.

The Court: The objection overruled, as referring to the time immediately after the accident.

A. Yes, I was talking to the patrolman. Outside of [83] that time I was down there with Levi and with Jane most of the time, and I don't know who all were around there.

Mr. Brown: Q. Did you talk to any man in uniform before the patrolman came?

A. No, I never did.

Q. Didn't you talk to Mr. Wilkerson?

(Testimony of Rachael Wilson.)

A. No, I don't even know what he looked like or where he was.

Q. Do you remember this, Miss Wilson, do you remember Mr. Wilkerson attempted to get the name of a man in your presence and the man refused to give his name, the man in uniform, and you told this man to keep his mouth shut and not to tell anything?

A. I was so shocked that I just didn't know.

Q. Do you deny it happened?

Mr. Felton: If the Court please, we object to that as improper impeachment. He must lay the foundation.

The Court: Objection overruled.

Mr. Brown: Q. Now, that may have happened? That may have happened? Do you understand my question? A. No.

Q. Now, which do you mean, that you didn't say that, or that you don't remember?

A. I was talking to the patrolman. That is the only one that I talked to about the accident. [84]

Q. Now, Miss Wilson, confine yourself to my question. You have had two years in college. I understood you to say that immediately after the accident you were so shocked that you didn't remember. Is it the fact that you did talk to him or you were so shocked that you don't remember?

A. I was shocked after the accident.

Q. Then, you might have had such a conversation immediately after the accident?

A. I might have had but——

(Testimony of Rachael Wilson.)

Q. That is what I am asking you.

A. Yes.

Q. Now, you say you noticed Martha's leg as she lay in the ditch? A. Yes.

Q. Which leg of her's was injured?

A. It was the left leg.

Q. Yes, she is wearing a brace on the left leg, isn't she? A. Yes.

Mr. Brown: That is all.

Redirect Examination

By Mr. Felton:

Q. Now, do you remember having any conversation with any soldiers immediately after the accident? [85]

A. No, I never had any conversation with any soldiers.

Q. And the only conversation you had was a patrolman? A. Yes.

Q. And that was about two hours after the accident? A. Yes.

Q. Did you see any soldiers around there immediately after the accident?

A. I don't remember who all was around there after the accident.

Mr. Felton: That is all.

Recross Examination

By Mr. Brown:

Q. Miss Wilson, do you recall seeing any soldiers there before the accident?

(Testimony of Rachael Wilson.)

A. No, I don't because we didn't see any soldiers.

Q. Do you remember a car coming up and stopping before the accident?

A. No, I don't.

Q. And some one getting out of the car and talking to you—

Miss Bacharach: Isn't this repetition?

The Court: This is repetition. She said she didn't remember anyone. What was the question?

(Last questions read.)

Mr. Brown: If the Court please, I am going to insist upon one counsel at a time upon one witness. Q. The question is: Before the accident do you remember the car coming up and stopping?

Mr. Felton: If the Court please, that is repetition, and I object to it.

The Court: Objection sustained.

Mr. Brown: If the Court please, I don't believe that that was gone into before.

The Court: It is my recollection of the testimony that this witness testified that after she left the car and started back along the highway she saw no other car and saw no soldiers.

Mr. Brown: I was mistaken as to what she covered. I will withdraw the question.

The Court: Any further questions?

Mr. Brown: No. No, your Honor.

Mr. Felton: No, no questions.

The Court: Call the next witness.

ROY WHITAKER,

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton: [87]

Q. Your name is Roy Whitaker, is it not?

A. Yes, sir.

Q. Where do you live, Mr. Whitaker?

A. Nez Perce, Idaho.

Q. And do you know Lottie Frank?

A. Yes, sir.

Q. Did you know her husband Levi?

A. Yes, sir.

Q. And do you know Martha and Titus Corbett?

A. Yes, sir.

Q. How long have you known Lottie and her late husband Levi? A. Since 1912.

Q. Were they friends of yours?

A. Yes, sir, very good friends.

Q. And you were in this car that we have been talking about that stopped on the north side of the road down near the Columbia River on the night of September 8th and 9th, were you?

A. Yes, sir.

Q. And you were one of the passengers in it?

A. Yes, sir.

Q. You heard the testimony as to how many passengers were in it, have you not?

A. Yes. [89]

(Testimony of Roy Whitaker.)

Q. And you have heard how you were located in the car? A. Yes.

Q. Is that all true? A. That is right.

Q. Where were you after these girls all got out of the car.

A. I was in the front seat, sitting on the right hand side.

Q. I think you are talking a little too low. I see that the Judge is moving over to listen to you. Where were you?

A. I was sitting in the front seat on the right hand side.

Q. And who was there with you?

A. At what time?

Q. Just after the girls got out?

A. There was Levi Frank, Titus Corbett and myself, all in the front seat.

Q. What happened after the girls got out with reference to another car coming up?

A. There was a car that pulled up behind us and said that was a dangerous part of the road there and——

Q. And what was done?

A. Immediately we pulled up to this driveway, and who was in that car, I couldn't say. I couldn't say who it was. [89]

Q. And then, was there any other car that came along after the accident?

A. Only the car coming east is the only one I saw.

Q. When did you first see this death car?

(Testimony of Roy Whitaker.)

A. After Levi Frank went out and went back there, Titus and I was in the car together. We seen the car coming.

Q. How was it coming?

A. Coming pretty fast and when I first seen him I glanced up and in the distance it looked like he got one light.

Q. What did Titus do?

A. I noticed Titus. I don't know whether he noticed that or not but he said, "I am going to blink my lights."

Q. All right, keep out what was said.

A. But he did blink his lights at that time.

Q. But the car came on by, did it?

A. At that time he said something to me and attracted my attention and I did see it pass, yes.

Q. And then what happened?

A. It wasn't long until we heard this scream from some woman. some woman screaming, and I couldn't tell which one it was.

Q. What did you and Titus do?

A. Titus got out and run and, of course, I am crippled and I got out as fast as I could. [90]

Q. Let us go back a minute. In my questioning I seem to have forgotten Levi. And when did Levi get out of the car?

A. Right after we pulled up into this driveway.

Q. And, then, there was only two of you left in the car at that time?

A. Yes, when they passed us.

(Testimony of Roy Whitaker.)

Q. Did Levi get out before you got into the turn-out or just after?

A. He got out just after we pulled into the turn-out.

Q. We got you to where somebody screamed, and you and Titus went up the road, and when you went up, back up the road, how far did you get, how far did you go?

A. Oh, I imagine a distance of maybe 200 or 250 feet or such a matter.

Q. You heard the patrolman Mr. Hyland testify, and you saw him draw this map, did you?

A. Well, that is just about correct.

Q. It is approximately correct, is it?

A. It is approximately correct, yes, sir.

Q. Then, at the time that you got there, tell the Court where Levi was lying.

A. He was lying there—well, between the hard surface and the shoulder is a narrow space of gravel probably two feet wide and then it tapers off into a ditch, and he was [91] lying on the incline of this ditch with his head towards the highway.

Q. Did you take a look at him? A. Yes.

Q. Did you go near him? A. Yes.

Q. What did you find?

A. His right leg looked like it was broken, double bent and his ankle was over his left leg.

Q. That was broken about midway between the ankle and knee? A. Just about.

Q. Between the right ankle and knee?

A. Yes.

(Testimony of Roy Whitaker.)

Q. Did you see any other marks?

A. I could see blood and marks on his ears.

Q. And where was Rachel Wilson at that time when you got back there?

A. She was standing right across close to Levi and Jane was near them.

Q. Did you go near Martha?

A. No, because it was kind of rough down in there and I can't walk too well and I couldn't get off of the edge of the shoulder.

Q. Did you see any of the people in the car, from that [92] other car?

A. Just that gentleman right there (indicating).

Q. That gentleman is who?

A. Right behind you.

Q. That is Mr. Wilkerson?

A. Yes, Wilkerson, yes.

Q. Did he say anything to you about his car? Well, let us go back a minute. Let us get this more nearly in order. I am ahead of myself again. Did you look at his car?

A. Not at that time, no.

Q. Did you later look at his car?

A. After they backed it up and put it on the other side of the road.

Q. When was that?

A. That was after the accident was practically cleared away and the sheriff and patrolman moved it off on the left hand side of the road.

Q. Did you look at his car? A. Yes.

Q. What did you find?

A. A few dents in the right fender and one

(Testimony of Roy Whitaker.)

near the windshield and the right headlight was broken.

Q. What was the lamp in the right headlight like? A. Just the reflector there.

Q. How was the bulb? [93]

A. I imagine it was still intact.

Q. Did you see any headlight glass around there? A. No, I didn't.

Q. Did you ask Mr. Wilkerson anything about that fender?

A. I think—I don't remember if I ask him or not. It seems as if someone asked him about this and he said that had happened before the accident.

Q. He said the fender had been damaged before this accident, and also the headlight?

A. Yes.

Q. Was there any other mark on the cowl of the car or thereabouts?

A. There seemed to be one in the right hand corner of the windshield or thereabouts.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Did you go out of the car just after you heard this scream or did someone come up to the car?

A. I got out of the car after Titus jumped out and I couldn't run in the dark and I had to walk and pick my way down. It takes a little time.

Q. I couldn't get it. Will you speak a little

(Testimony of Roy Whitaker.)

lounder, please. Did you talk to Mr. Whitaker that evening? [94]

A. Yes, that evening.

The Court: You mean Mr. Wilkerson.

Mr. Brown: Q. I mean, Mr. Wilkerson; did you talk to him that evening?

A. I seen him on the highway.

Q. Didn't he ask your name?

A. Oh, yes, I remember he asked me if I would sign my name for a witness, and I signed some kind of name, and I don't remember what kind of name, and I don't know who the gentleman was.

Mr. Brown: If the Court please, I insist that he be responsive to the questions and speak up.

Q. He asked you your name?

A. He asked me if I would sign as a witness and he handed me a paper. I didn't sign my name.

Q. You signed a name?

A. I signed another name.

Q. You gave the name of "C. E. Brown"?

A. For some other purpose.

Q. Did you come from Idaho for this purpose, what did you come for?

A. I came down from Idaho with Levi after a load of fine salmon.

Q. You came down with these people?

A. Yes, from Kooskia. [95]

Q. You had been with them all the while they were there? A. I didn't understand.

Q. You had been with them while they were at Celilo? A. Yes, sir.

(Testimony of Roy Whitaker.)

Q. And you had been up on this party at Goldendale? A. Yes, sir.

Q. Now, when did you say that Levi got out of the car?

A. As near as I can remember, right after we pulled into that driveway.

Q. And you believe that that was before the accident that you pulled into the driveway?

A. I don't believe it; I know it.

Q. It was your direct examination that it was before the accident? A. Yes.

Q. And you say that there was a car that stopped there just before you pulled up?

A. Yes, just before we pulled up there it stopped and they asked us to move to a wider place in the road.

Q. Did you see the men in that car talk to the women and to Levi?

A. No, I didn't.

Q. Do you know where Levi and the women were at that time when that car stopped?

A. Behind the car some place. I don't know where. [96]

Q. As far as you know, they may have been in the center of the road?

A. Levi was with us but the women may have been back down in the road somewhere.

Q. Which is your correct name, Whitaker or Brown? A. Whitaker.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

M. A. POWELL

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. And your name is M. A. Powell, is it?

A. Yes.

Q. P-o-w-e-l-l (Spelling)?

A. Yes, sir.

Q. And where do you live, Mr. Powell?

A. I live at Lapwai, Idaho.

Q. And who do you work for?

A. I work for the United States Government.

Q. In what official position?

A. Agricultural Extension Agent for the United States [97] Indian Service.

Q. With what Indian Service are you now connected with?

A. Northern Idaho Agency comprising four reservations.

Q. Does the Nez Perce Reservation come within your jurisdiction? A. It does.

Q. How long have you worked for the United States Government?

A. About thirty-five years—No, twenty-five—twenty-seven. I will get it right after a while. Twenty-seven years.

Q. How long have you worked in this Indian work?

A. Indian work for seventeen years.

(Testimony of M. A. Powell.)

Q. How long have you been acquainted with the Nez Perce Indians?

A. About fourteen years.

Q. Your location is at Lapwai, is it not?

A. Yes, sir.

Q. Lapwai is about how far out of Lewiston?

A. Between fourteen and fifteen miles from Lewiston.

Q. Outside of Mr. Whitaker who is not an Indian, are these other people Tribal Indians?

A. Yes.

Q. All of them? A. Yes, sir.

Q. Then, this place of Kooskia, Idaho, how far is that [98] from Lapwai?

A. Oh, let me see, about—let me see, sixty-five and ten is seventy-five and—about seventy-five miles, approximately.

Q. Do you have occasion to go there frequently in your work?

A. An average of once a month.

Q. Did you have occasion to come in contact with Mr. and Mrs. Levi Frank in the last few years? A. Yes.

Q. And how often?

A. Well, I would say that I would see them eight to ten times each year.

Q. Do you know Levi Frank?

A. Yes.

Q. And do you know his family?

A. Yes, sir.

Q. Have you visited in it? A. Yes, sir.

(Testimony of M. A. Powell.)

Q. And what kind of person was Levi Frank; in other words, how old was he?

A. He was—I would guess—I would say right off, he was thirty-five or thirty-six years old. He was well liked and he was rather industrious.

Q. And I will go on and ask you this and pick this up [99] and the other attorney's objection to this——

Mr. Brown: I haven't objected.

The Court: There was no objection.

Mr. Felton: I am anticipating. There was an objection before. Q. What was his condition of health?

A. He was in very good health.

Q. And what was his character, his industry and prudence, if you know it?

A. Well, I would consider him above the average. He was a good worker.

Q. When you talk about above the average, are you talking about in ordinary whiteman's standards or simply Indian standards, or which?

A. Well, ——

Q. Did he compare favorably with a whiteman working and so on?

A. He would compare very favorably with any whiteman, yes.

Q. And what did he work at?

A. Well, he was working on the ranch up there and he had twenty-five or thirty head of cattle and had to provide Winter feed for them and take care of them during the summer time, and he also done

(Testimony of M. A. Powell.)

odd jobs around for other farms and he also worked in the woods during some of the time.

Q. How about his drinking habits? [100]

A. Sir?

Q. How about his drinking habits, did he drink liquor?

A. About when I first knew Mr. Frank he did occasionally drink. The last five or six years Mr. Frank never did any drinking.

Mr. Brown: That you know of?

Mr. Felton: Let the man testify.

Mr. Brown: He can't testify except to his own knowledge.

The Witness: That is right. That is right, to my knowledge. He was never drunk when I ever saw him in the last five years.

Mr. Brown: That is what I am getting at.

Mr. Felton: Q. And people that drink on the reservation, you people at the Agency know about them, don't you?

A. I know every one that does.

Q. How about his wife Lottie, do you know her?

A. I know Lottie, yes.

Q. Upon what does she live; did she have a separate income or did she live upon her husband's industry?

A. She had no other income except what her husband provided.

Q. She was dependent upon him for support?

A. Yes, as far as I know, yes.

Q. Did they live together? [101]

A. Yes.

(Testimony of M. A. Powell.)

Q. As man and wife in the family?

A. Yes.

Q. Now, the words "Tribal Indian" have been used here. Does that have any significance as to income?

A. That has no significance as to income that Indians receive.

Q. As to any of these people? That is as to any who have been here, these Nez Perce people; do any of them receive any income from the Tribe?

A. No.

Q. Did either Lottie Frank or her husband Levi have any allotment from the Government?

A. No.

Q. I will ask you then directly if Levi and Lottie Frank were not dependent upon the produce of Levi's industry? A. Yes, I would say yes.

Q. You saw Levi after he was dead, didn't you?

A. Yes, sir.

Q. And what was the occasion of it?

A. Well, I—we come—Mr. Warmel, our Indian officer, asked me to come down with him when they heard about this death and we went into the undertaker's and I saw Mr. Frank's body in the undertaker's.

Q. Was it clothed at that time? [102]

A. Yes.

Q. What was the condition of his body as to injuries you saw there?

A. Well, the undertaker showed us his broken leg and the crushed skull.

(Testimony of M. A. Powell.)

Q. The crushed skull was crushed where?

A. At the back.

Q. How high?

A. Well, it was right around there (indicating).

Q. About ear level, would you say?

A. Yes, ear level, that is about as near as I could say.

Q. Directly at the back of his head?

A. No, I think it was more to one side—well, I couldn't tell. The whole back of it was then bruised.

Q. Did you then go to Mr. Wilkerson's place somewhere and see the automobile, the death car?

A. Yes, sir.

Q. And in what condition was that car?

A. Well, the right front fender and headlight had been damaged.

Q. Was there any damage on the cowl of the car?

A. I couldn't say as to that. The officer that was with me made the examination carefully and I didn't notice anything on the—

Q. Which leg was broken? [103]

A. The right leg was broken.

Q. And where?

A. Well, between the knee and the hip.

Q. The big bone between the knee and the hip?

A. Yes.

Mr. Felton: I see. All right, you may inquire.

(Testimony of M. A. Powell.)

Cross Examination

By Mr. Brown:

Q. Now, you say that they lived on a ranch, a farm? A. Yes, sir.

Q. Was that farm on the reservation, in the Nez Perce Reservation?

A. It is without the—you will have to define that question a little more because the reservation boundary—because this ranch is without the reservation boundary.

Q. It is outside of the reservation boundary?

A. The present reservation boundary. I will say it that way.

Q. But it was formerly inside the reservation?

A. Yes, sir.

Q. Who owns the ranch, the Government or them? A. It is owned by the Indians.

Q. How did they acquire title to it?

A. Fee patent was issued to them. [104]

Q. Then, if they have fee patent to the land, do you still regard them as Tribal Indians in Idaho? A. Yes, sir.

Q. And that was the original allotment of one of these people? A. Yes, sir.

Q. Was it an allotment to him or to his wife, if you know?

A. Well, it wasn't the allotment of any of these people. It was their—somebody before they came—it was either their mother's or father's, I don't know.

(Testimony of M. A. Powell.)

Q. Then, you don't know whether it was Levi or his wife?

A. Well, it was his wife's relatives.

Q. It came through his wife's relatives and so it was her property?

A. Yes, sir.

Mr. Felton: Mr. Brown, I will clear it up with Mrs. Frank a little bit.

Mr. Brown: I want to clear it up with this witness.

Q. Now, had Levi himself ever received an allotment?

A. No.

Q. Aren't there still Tribal lands in the reservation?

A. Yes.

Q. Owned by the Tribe?

A. Yes, sir.

Q. And then there is revenue coming in?

A. Yes, sir.

Q. And then there is timber and—

A. Well, they get some money for timber and mines and farm land.

Q. As a matter of fact, the Nez Perce Reservation is considered one of the valuable reservations in Idaho?

A. Well, if you would permit me, I would like to explain that it isn't a closed reservation. It isn't a closed reservation the same as Yakima. We have white owned and Indian owned lands.

Q. Yes, I understand that, but there is still a lot of land owned by the United States Government in trust for the Indians?

A. Yes, land which the Government holds in trust.

(Testimony of M. A. Powell.)

Q. That the Government holds the title in trust for the Indians? A. Yes, sir.

Q. And both Lottie and Levi are members of that tribe? A. Yes, sir.

Q. And beneficiaries of that trust?

A. Yes, sir.

Mr. Brown: That is all.

Q. Oh, you say that there was personal property and cattle and so forth, was that owned by Levi or by Lottie? [106] A. Both of them.

Q. Both of them together? A. Yes, sir.

Q. What would you say would be the value of it, have you any idea?

A. The cattle or real estate?

Q. The cattle.

A. Well, that is approximately thirty head worth seventy dollars or \$2100.00.

Mr. Brown: That is all.

Redirect Examination

By Mr. Felton:

Q. Now, Mr. Powell, coming back to these Tribal Indians, do the individual members of the Tribe get any benefit out of the lands?

Mr. Brown: If the Court please, I object to that as calling for a legal conclusion. I think your Honor is thoroughly familiar with the law as to the Tribal Indians.

The Court: We have gone pretty far into this. I will permit him to answer.

The Witness: Not directly.

(Testimony of M. A. Powell.)

Mr. Felton: Q. The money is put into the fund, is it not?

A. We have approximately \$200 of Tribal funds but that [107] is used for Tribal enterprises as a benefit to the entire group, and for loans. They can get loans. They make loans to the individual Indians.

Q. But as far as Lottie getting any money to live on out of these Tribal funds, she doesn't get any?

A. None whatsoever.

Mr. Felton: I have no further questions.

The Court: Any further questions?

Mr. Brown: No.

The Court: You may step down.

LOTTIE FRANK,

a plaintiff herein, was recalled as a witness on her own behalf, and testified as follows:

Direct Examination

By Mr. Felton:

Q. Mrs. Frank, how long have you and Levi Frank been married?

A. We lived together eight years.

Q. As husband and wife? A. Yes.

Q. Now, we are talking about this ranch up the river. Whose ranch is that, that you live on?

A. It belongs to my mother. [108]

Q. Is she still living? A. That is right.

Q. How many children has she?

A. Has my mother?

(Testimony of Lottie Frank.)

Q. Yes. A. Seven.

Q. And how big a ranch was it?

A. Eight acres under cultivation and about eighty acres of pasture.

Q. Now, what kind of country is that; does it lay in a deep canyon or on a hillside, or where?

A. Just along the river.

Q. That is on the Middle Fork of the Clearwater River? A. That is right.

Q. Is that river there running through a deep canyon? A. Yes.

Q. And that eight acres lies in the bottom of the canyon, does it? A. Yes, sir.

Q. And the pasture is on the hillside, is that right? A. Yes, sir.

Q. How many cattle did you and Levi have at the time of his death? A. Thirty head.

Q. And were all of those yours? [109]

A. No.

Q. Whose cattle were they?

A. They belonged to the Government I. D. Department—Indian Department.

Q. They were Indian Department cattle?

A. Yes.

Q. You get them in the form of a loan?

A. Yes, sir.

Mr. Brown: Let her testify.

Mr. Felton: Q. What has happened to those cattle; have you got them yet? A. No.

Q. Have you got any income from any source except the possibility of recovery in this case?

(Testimony of Lottie Frank.)

A. No, I have not.

Q. How old was your husband at the time of his death?

A. Thirty-five.

Q. And what was his condition of health?

A. He was in good health.

Q. Had he ever had any sicknesses?

A. Never.

Q. How big was he?

A. Five feet, eight inches, and he weighed one hundred and—(witness cries).

Q. Just go on, Mrs. Frank, let us go on through this. [110] I know it is hard on you, but let us go on through. About how much did he weigh?

A. About 175 pounds.

Q. Did he work?

A. Yes, sir.

Q. What kind of living did he earn for you?

A. A good living.

Q. Did you work while he was alive?

A. No.

Q. Have you any trade or occupation of your own?

A. No, I don't have any.

Q. What kind of work did he do?

A. Well, he kept the ranch agoing and then he would work out in the logging camps.

Q. About how much of the year did he work in the logging camps?

A. Oh, six or seven months of the year.

Q. Do you know about what he earned out there?

A. Oh, about two hundred dollars.

Q. A month? A. A month.

(Testimony of Lottie Frank.)

Q. And then, you had some income from your cattle, did you? A. A little.

Q. And was that sufficient for you to live on nicely? [111] A. That was.

Q. How old are you? A. Thirty-one.

Q. How about Levi's habits as to drinking or not drinking?

A. He used to drink a lot before we were married but after we were married he never drank.

Q. Did he drink anything at all?

A. Oh, I would say that he would take a drink maybe twice a year but not to get drunk.

Q. Then, he wasn't a drinking man?

A. He wasn't a drinking man.

Q. You have a couple of children who have been living with you, don't you?

A. That is right.

Mr. Brown: If the Court please, I am going to object to any further reference to these children. They are not their children and there can be no recovery for them. The statute says that they must be children of the decedent.

The Court: I think I will sustain the objection.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Mrs. Frank, how long had you been married?

A. Eight years.

Q. Now, on this ranch where you live, your mother lives there too? A. Yes.

Q. And her other children?

(Testimony of Lottie Frank.)

A. No, I am the only child of hers that lives there.

Q. But there are other relatives besides your mother that live there on this ranch? A. No.

Q. The only estate that your husband left was your claim, isn't it? A. What claim?

Q. Against Mr. Wilkerson?

A. He didn't leave any.

Q. I mean, you were appointed Administratrix of his estate? A. That is right.

Q. And you testified as to property when you were appointed, and how much property he had, is that true? A. I didn't get the question.

Q. When you were in court you were appointed Administratrix of his estate——

Mr. Felton: Not in Idaho.

Mr. Brown: How was the bond fixed?

Mr. Felton: They don't do it over there. [113]

The Court: I prefer to have you address your remarks to the Court.

Mr. Felton: Pardon me, your Honor, I was just telling counsel that they don't ask that question over in Idaho.

Mr. Brown: Q. Well, did your husband leave any estate at all outside of these borrowed cattle?

A. No.

Q. And you were living on your mother's ranch?

A. Yes, that is right.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

Mr. Felton: I want to call Mr. Hyland back on the stand for a moment and get this exhibit in.

GORDON E. HYLAND,

recalled as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Now, Mr. Hyland, when you were on the stand before and made your drawing on the board I asked you to prepare a drawing on paper which could be for the record, and you have drawn Plaintiffs' Exhibit A, which I am handing you. Is that the same as the other? [114]

A. That is. That is the drawing I prepared.

Mr. Felton: This has been submitted to counsel.

Mr. Brown: Yes. I have no objection.

Mr. Felton: I offer in evidence this Plaintiffs' Exhibit A.

The Court: It will be received.

(Whereupon, drawing of scene of accident, previously marked for identification, was received in evidence as Plaintiffs' Exhibit A.)

Mr. Felton: You may inquire.

Mr. Brown: This will go beyond immediate cross examination. I asked counsel to ask him back for cross examination on his former testimony.

Cross Examination

By Mr. Brown:

Q. Mr. Hyland, you were there with Sheriff Woodward?
A. Yes, sir.

(Testimony of Gordon E. Hyland.)

Q. And the deputy was along?

A. Yes, sir.

Q. You were all there? A. Yes, sir.

Q. Did you interrogate this lady up here as the plaintiff here in this case and her two companions about what they had been doing that evening? [115]

Mr. Felton: If the Court please, I believe that is improper cross examination. I asked only about physical facts when he testified here.

Mr. Brown: Well, he said he talked about the accident. He is available to the defense as a witness.

Mr. Felton: If the Court please, this is improper cross examination.

The Court: I think it is outside of the scope of the cross examination of what was asked the witness on direct.

Mr. Brown: I will drop that.

Q. Did you examine the shoulder of this road just west of where the tire marks showed up?

A. Yes.

Q. Did you see where tire marks had been made off of the road?

A. I saw no indication of any vehicle travel on the shoulder of the road.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

Mr. Felton: Now, if the Court please, we come to the place that I rather anticipated where we have Dr. Vogt, and he will be here at three o'clock.

I can't complete my case until the doctor is through, but the doctor promised he would be here at three o'clock. If it is satisfactory and the [116] defendant wishes they can go ahead.

The Court: I think that perhaps the more orderly way would be to recess until three o'clock. You are through except for the doctor's testimony?

Mr. Felton: Yes, I am through except for the doctor's testimony.

The Court: Unless Mr. Brown has a witness he would rather put on, I would rather have the plaintiffs proceed to close their case.

Mr. Brown: I would rather have the case closed because I have a motion.

The Court: Yes.

Mr. Brown: I think, your Honor, it won't make an extra day's time.

The Court: If your witness should come before three o'clock, let me know.

Mr. Felton: I will inform the Court as soon as he comes in.

The Court: Court will recess subject to call.

(Short recess.)

Mr. Felton: I will call Dr. Paul Vogt.

PAUL VOGT,

called and sworn as a witness on behalf of the plaintiffs, testified as follows: [117]

Direct Examination

By Mr. Felton:

Q. Your name is Dr. Paul Vogt?

A. Yes, sir.

(Testimony of Paul Vogt.)

Q. The thing I am handing you is your record that you brought along. You will probably need it for refreshment of memory. And where do you live, Dr. Vogt? A. In The Dalles, Oregon.

Q. What is your business or profession?

A. Physician.

Q. What training did you have in order to get any degrees that you have? A. I have——

Mr. Brown: I will admit his qualifications if you will just inquire how long he has practiced in The Dalles.

Mr. Felton: Q. How long have you practiced at The Dalles?

A. I have been practicing there for four years beginning in 1937, with the exception of being in the Army.

Mr. Brown: I will admit his qualifications.

Mr. Felton: I just want to go into one qualification.

The Court: Yes.

Mr. Felton: Q. You have been licensed, of course? A. Yes.

Q. What kind of work do you do? [118]

A. Orthopedics.

Q. That is roughly what?

A. Bone surgery.

Q. That is the type of work you performed upon Mrs. Martha Corbett? A. Yes, sir.

Q. How long have you practiced orthopedic work?

(Testimony of Paul Vogt.)

A. Over five years. In the service I did that, doing nothing else.

Q. And you returned to The Dalles when?

A. In September, 1945.

Q. And was Martha Corbett one of your patients.

A. Yes, she was.

Q. Do you know from your records and from your statements what her condition was at the hospital?

A. From the records and from the statements of the physician who treated her upon her admission—

Mr. Brown: If the Court please, I am going to object to anything that the other doctor told him concerning her condition.

Mr. Felton: Q. Now, what was the type of injuries she had?

A. She had two main injuries. One was to her back in which she sustained fractures of the transverse processès of the first, second and third lumbar vertebrae. Those are [119] not the main portion of the vertebrae but the small lateral projection to which the muscles in the back are attached. And those three were fractured. And her foot, her left foot was the other part seriously injured, and there she had crushing and vulsing injury to the side and top of the foot.

Q. What was the extent of that injury?

A. The extent of that injury, it involved the skin which was completely destroyed and the skin over the—some of the top and lateral aspect of the

(Testimony of Paul Vogt.)

foot and ankle had lost its circulation and died. Beneath that the soft tissues were also also injured and that gravel and sand and weeds or whatever it happened to be, such articles as that, were ground into the soft tissues. Also, several tendons were severed, by name the peroneus longus and bevis. The function of those particular tendons is to pull the foot laterally so that there will be abduction, you call that abduction, and it is help raise it up. Also, there was a fracture of the base of the fifth metatarsal. That is one of the small bones of the foot.

Q. Then, there were some bones in the foot broken

A. I said there was a fracture of the base of the fifth metatarsal.

Q. What treatment was given to her?

A. On admission the wound was thoroughly cleansed, and all the foreign material in the way of gravel was removed, together with other like substance, and it was thoroughly [120] washed and she was given tetanus anti-toxin and the attempt was made to suture down and extend the flap of skin that had evulsed. However, that did not remain and had to be removed. However, the tendons were sutured. The fracture was not sufficiently severe as to require reduction. As the original skin did not hold it was necessary to do a free skin graft, which was done.

Q. What does that consist of?

A. The skin graft is called full thickness graft.

(Testimony of Paul Vogt.)

The skin which wasn't the full thickness was replaced by skin from the thigh and was placed over the granulated portion on the foot after that had been cleared off.

Q. You cut a piece of skin off the thigh and put it on the foot? A. Yes, that is right.

Q. Go ahead, Doctor.

A. That skin graft held very well, and following that it was recommended that she obtain a drop-foot brace, what we call a drop-foot brace, inasmuch as the tendons had been injured and as this function of them did not return the foot did not—the foot tended to drop as she walked. Also, there was still due to the loss of soft tissue some tendency of the foot to swell. This is the condition as stated on her discharge from the hospital.

Q. And is this brace she is wearing, is that the brace [121] that you recommended that she get?

A. That is the type of brace that I recommended to prevent the toe from dropping down.

Q. That means that the toe drops down and will not come back up?

A. That is right. She hasn't full muscular power to guide it. She may bring it back but if she walks the limb muscles fatigue and it begins to drop.

Q. And how long will it be necessary for her to wear this brace?

A. If the tendon function has not returned by now, essentially more than six months following the injury, if it isn't back within the next six

(Testimony of Paul Vogt.)

months, I would say that it would be a permanent defect.

Q. And dropping that for a minute until she gets her shoe off, how about her back injury?

A. The back injury consisted, as I said, of the fractures of the first three transverse processes of the lumbar region.

Q. If that still pains her, what does that indicate?

A. Well, those—that may indicate not that the fractures haven't healed but that she may have some—whatever would be causing the pain would be in the nature of soft tissue injury.

Q. Take a look at her foot now here as she has it exposed, and see if it is in the same condition as it was when [122] you left her last; that is, when you last saw her?

A. (Going down to Mrs. Corbett and examining her foot.)

The Court: I will ask you, Doctor, if it will be the most orderly way to make your examination and continue your testimony when you return to the stand.

The Witness: Unless I can illustrate to you here the condition.

The Court: Yes, if you feel you can.

The Witness: There is some scar contracture which prevents full motion causing limitation of motion. Now, if you pull the toes up this way. She has this ability to pull her foot up this way. Now, pull your foot up this way. Now, here is what she

(Testimony of Paul Vogt.)

can't do. The average person can put her foot out to one side and she lacks that motion which is due to the injury. (Returning to witness stand.)

Mr. Felton: Q. Just a moment, this area that shows here is the area where the skin was grafted on her foot? A. Yes.

Q. How much in the way of scar injury or whatever way you compute how much skin was grafted?

A. I don't recall. I don't think we measured it with that idea in mind.

Q. How many operations did it take?

A. It was just a single operation, removing skin from the thigh and suturing it in place. [123]

Q. How about pain in these matters, in the way she was injured, pain and suffering?

A. Do you mean at the time of injury?

A. No, through her hospital life and later on; the pain?

A. Well, that is a difficult question. She had a certain amount of pain. Anyone who sustains that type of injury sustains that pain. However, I don't think she had any more than anyone else.

Q. There is a certain amount of pain attached with it? A. Yes.

Q. And her foot is painful now?

A. She didn't complain of any pain except in stretching the scar.

Q. In your opinion can she ever obtain full use of her foot?

(Testimony of Paul Vogt.)

A. I don't believe that the foot will be normal again.

Q. How about her back?

A. I think—I have not examined her back recently but it is—it is the usual thing that back injuries of that sort do not leave any permanent disability.

Q. They get over it in how long a time?

A. They vary—that varies with the individual case.

Q. And it might consume several years?

A. Well, it may be from a month to years.

Q. Have you got any opinion on the amount of disability [124] that would be caused a mechanic, for instance, she is a mechanic, from this foot and back?

A. That would be difficult to determine without examining her back at this time in detail.

Q. All right, let us leave it and go to the foot itself.

A. The foot will bother her in any occupation where she will be required to do any walking or standing or lifting, you might say.

Q. You called your hospital and got a record of your charges, did you not?

A. That is right.

Q. You are a member of that organization down there? A. Yes.

Q. And you obtained a record of your charges through your office? A. Yes.

Q. What was the medical charge?

(Testimony of Paul Vogt.)

A. \$125.00.

Q. What was the hospital and other charges?

A. The hospital charges were \$378.70.

Q. And the brace and some other stuff was bought outside by these people.

A. The brace was bought outside and I can't tell you what that was.

The Court: What was the hospital bill again, Doctor? [125]

A. \$378.70.

Mr. Felton: You may inquire.

Cross Examination

By Mr. Brown:

Q. Doctor, did you inquire if those charges had been paid?

A. The hospital bill had been paid.

Q. By whom?

A. By, apparently, the Corbetts. I did not inquire as to who paid it but I believe that the Corbetts paid the hospital bill. I believe it was paid in installments, as I remember.

Q. It wasn't the United States Indian Service that paid it? A. Please?

Q. Didn't the United States Indian Service pay it? A. I can't tell you if they did.

Q. Do you know Dr. Poley? A. Yes.

Q. Was he your associate in this?

A. Doctor Poley was a member of the clinic.

Q. He was the doctor who first took care of this girl?

(Testimony of Paul Vogt.)

A. No, he wasn't. I believe Dr. Smith, a member of the clinic was the doctor who did the surgery on the initial operation. [126]

Q. And Dr. Poley had nothing to do with it?

A. Yes, Dr. Poley examined her and helped out on the case.

Q. Have you seen her since October 9th?

A. I haven't seen her since she left.

Q. And that was October 9th?

A. No, it probably was later than that.

Q. On October 20th?

A. Yes, I believe it was October 20th.

Q. October 20th, and did you examine her foot when she left? A. Yes.

Q. Hasn't there been a decided improvement since she left?

A. There has been an improvement in the sense that they may be a little less swelling but the scar is still intense and adherent in the region of the skin graft and it was still tight and the loss of motion is still apparent.

Q. Now, this instrument that she has on is the foot-drop and the purpose of that is to try to overcome the foot-drop, to get support for the foot?

A. The purpose of that is to eliminate the danger of the foot dragging and tripping.

Q. And that is only necessary for some little length of time? [127]

A. No, it isn't. It is necessary to wear that permanently or have the correction by another operation which would help the ankle joint or pro-

(Testimony of Paul Vogt.)

vide a permanent block so that it could be supported.

Q. Well, in wearing the brace that aids in weight bearing.

A. Well, wearing a brace isn't for the purpose of weight bearing.

Q. Well, isn't one of the purposes to permit her to put some weight on her foot? A. No.

Q. You advised her to start putting some weight on it?

A. Yes, the reason that she wasn't allowed to bear weight for some time after her injury was this: That she had sufficient soft tissue injury and disturbance of the blood supply so that this foot would tend to swell and in swelling it would become painful and she was gradually allowed to be out of bed and the swelling would be painful for short periods and gradually she was allowed to be out for short periods of time.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.) [128]

TITUS CORBETT

a plaintiff herein, recalled as a witness on his own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. Mr. Corbett, there was some testimony about payment for a foot brace. Who paid for that?

A. I did.

Q. And what did you pay?

A. Fifty dollars.

Q. And, then, you bought some medical supplies outside of these bills that were paid, did you not?

A. Yes, sir.

Q. And how much do you think that that run you?

A. Oh, probably ten dollars.

Q. And who paid this hospital bill that has been paid? A. I did.

Q. Out of what money?

A. My own money.

Q. Was there any Tribal monies or any Indian monies used for this? A. No.

Q. And you intend to pay the doctor bill out of your own monies, do you?

A. Yes, sir. [129]

Mr. Felton: I think that is all.

Mr. Brown: No examination.

(Witness excused.)

Mr. Felton: I want to call Mrs. Frank from the standpoint of one thing I forgot to prove, which was funeral bills.

LOTTIE FRANK

a plaintiff herein, recalled as a witness on her own behalf, testified as follows:

Direct Examination

By Mr. Felton:

Q. And you are Lottie Frank who was on the stand here before? A. Yes, sir.

Q. I forgot to inquire of you as to funeral bills.

Mr. Brown: Object to any testimony about funeral bills, if the Court please as not within the issues of the case. No allegation in the complaint and no prayer for any funeral bill.

The Court: Let me see the Complaint.

Mr. Felton: There was no special pleading on it, your Honor.

The Court: It is my understanding that under the Rules of Civil Procedure for the United States District Courts [130] the rule is that special damages must be specifically pleaded.

Mrs. Felton: This is special damages and there is no special pleading on it, that is right. All right, you may come down. The plaintiffs rest.

Mr. Brown: If the Court please, at this time, as to both cases, I want to move for dismissal of the plaintiff's complaint. I understand that that doesn't waive the right to proceed. It is the same as the state court. On the grounds that the evidence affirmatively shows contributory negligence on the part of the plaintiffs and it doesn't affirma-

tively show any negligence on the part of the defendant. And in addition to that, I want to show that the evidence brought by——

Mr. Felton: I can't hear counsel.

Mr. Brown: Dismissal of the suit brought by Mrs. Frank in her representative capacity on the grounds that the complaint does not state a cause of action, in that no dependency is pleaded and the proof went in over objection. Now, I want to direct myself to the last one first, your Honor. This is necessarily brought under our death claim statute and it provides that when death of person is caused by a wrongful act, neglect or default of another——

(Whereupon, argument of counsel was had upon motion for dismissal.) [132]

The Court: The motion will be denied. You may proceed.

Mr. Brown: Your Honor, I think that the answer fully explains our case. There is no necessity of my making a statement.

The Court: I think so. If you wish to make a statement, you may. I will not ask you to do so.

Mr. Brown: I will not. I will call Mr. Hyland.

GORDON E. HYLAND,

called as a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Hyland, did you in the presence of Mr. Titus Corbett or at any time there instruct the

(Testimony of Gordon E. Hyland.)

ambulance driver that night to take Titus Corbett to jail and lock him up until you got there?

A. I did not.

Q. Did you and the sheriff have any conversation with any of these people relative to what they had done that evening? A. Yes.

Q. You were stationed at Goldendale, were you not? A. Right. [132]

Q. And what time did that carnival close that evening? A. About twelve-thirty.

Q. Now, which one of the witnesses, if you can recall, did you talk to about what they had been doing?

A. I talked to two. This man over here. I can't recall his name.

Q. Mr. Whitaker?

A. Yes, Mr. Witaker. And I talked to Rachael Wilson.

Q. Yes. Titus Corbett, did you talk to him?

A. No.

Q. Was he present when you talked to the others?

A. He might have been present when I first talked to Miss Wilson.

Q. What was said about drinking, if anything?

A. I questioned as to when they had had anything to drink.

Q. And what did they tell you?

A. That they had had nothing to drink from the time that they had left Celilo.

Q. Ten o'clock that evening?

(Testimony of Gordon E. Hyland.)

A. Whatever that time was.

Q. Now, one other question. So far as you know, the car that was occupied by the plaintiffs may have been moved after the accident, up to the point that it was occupying when you got there?

A. That is right.

Mr. Brown: That is all.

Cross Examination

By Mr. Felton:

Q. Mr. Hyland, you had some conversation that Mr. Corbett might have heard that you wanted to question Mr. Corbett some more, didn't you?

A. I believe that the statement that I made to the ambulance driver was that I requested that Mr. Corbett go with his own wife in the ambulance to The Dalles. In other words, that the ambulance driver needed somebody to ride in the ambulance with Mrs. Corbett and I chose Mr. Corbett because it was his own wife; and I instructed the ambulance driver to kindly keep an eye on Mr. Corbett and see that he didn't leave the hospital because I wanted to see him later.

Q. Now, you mentioned the fact that you questioned as to drinking? A. Yes, sir.

Q. As to the various people in the car?

A. Yes.

Q. In your opinion, did liquor have anything to do with this accident on either side?

Mr. Brown: I think that is a conclusion of

(Testimony of Gordon E. Hyland.)

the witness, calling for a conclusion of the witness and I will object to it. [134]

The Court: I will sustain the objection.

Mr. Felton: Q. All right, did you find any evidence of drinking on the part of Martha Corbett?

A. Wait a minute until I get these people sorted out.

Q. She was the girl that was in the ambulance.

A. I made no attempt to discover whether she had been drinking.

Q. So far as you know, there was nothing to show that she had been drinking?

A. I never got close enough to her.

The Court: Who was it you were referring to?

Mr. Felton: Martha Corbett.

The Witness: At the time I arrived at the scene of the accident she was on the side by the side of the ambulance.

Mr. Felton: Q. You had no way of determining? A. No.

Q. How about the deceased man; did you get close to him? A. Yes.

Q. Did you find any evidence of drinking?

A. No.

Q. That takes care of the two injuries.

A. Yes.

Q. And I believe you smelled some faint odor of liquor confined to Mr. Whitaker and Rachael Wilson? [135]

(Testimony of Gordon E. Hyland.)

A. And Titus Corbett.

Q. And that was all? A. Yes.

Q. The two people that were injured here, there was apparently no liquor that you know of as to them that would indicate they had been drinking?

Mr. Brown: If the Court please, I object to this. He has testified that he didn't get close to the girl and the man was dead.

Mr. Felton: Q. Were any of these people noticeably affected by liquor?

A. That would be a hard question to answer, I mean to explain.

Q. They weren't in a drunken stupor, were they?

A. May I explain that. It is hard to answer.

Mr. Brown: I have no objection.

Mr. Felton: Q. All right, let us get this cleared up.

A. The symptoms of shock and drunkenness are so nearly identical that I couldn't attempt to determine whether it was drunkenness or shock, unless I had other evidence to sustain that.

Q. But you have injury evidence.

A. There was no physical evidence of any liquor at the scene of the accident.

Q. What happened to Titus Corbett's body—

A. To which?

Q. I will cut that question. When did you smell liquor on Titus Corbett?

A. At the hospital at The Dalles.

(Testimony of Gordon E. Hyland.)

Q. That is after the accident, how long after that?

A. Oh, probably three quarters of an hour or one hour after I arrived at the scene of the accident.

Q. At the scene of the accident you smelled no liquor on him?

A. I didn't get that close to him at the scene of the accident.

Q. Then, you don't know whether he had any liquor at all at the scene of the accident, is that the way you are placed? A. That is true.

Mr. Felton: That is all.

Mr. Brown: That is all. Now, so far as I am concerned, your Honor, this witness can be excused from further attendance on the Court. They need him on the highway.

The Court: He may be excused if Mr. Felton has no objection.

Mr. Felton: I think we will keep him around this afternoon and we will know better later whether we will need him. [137]

ROBERT W. MERRILL

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Merrill, by whom were you employed on September 9th, 1945?

A. I was in the Army at the time, in the Air Corps.

Q. And where was your base station?

A. Ephrata, Washington, Ephrata Army Air Base.

Q. How long had you been in the Army?

A. I had been in four years and one month.

Q. And what had been your service in the Army?

A. I had been in service thirty-four months in the Aleutian Islands in the Air Corps.

Q. In what capacity in the Air Corps?

A. I was Navigator on a B-17 Bomber and on other heavy bombers.

Q. Why did you leave the Air Corps?

Mr. Fenton: Objected to, if the Court please, as immaterial.

Mr. Brown: It is very material. I can't put on his testimony without showing his background. I want to show that he was grounded and made a military policeman and had had lots of experience, and—— [138]

The Court: He may proceed; it is preliminary.

(Festimony of Robert W. Merrill.)

Mr. Brown: Q. Why did you leave the Air Corps and go into the ground forces?

A. We were over at Kiska and the flack came through the ship and I was injured in my head and back and my eye and I was knocked out and I lay flat in the hospital three months up there and we evacuated to Fort George Wright Hospital and I stayed four months in the hospital.

Q. And when you were restored to duty, what work did you do?

A. Military police, road patrol.

Q. And how long were you in the military police? A. Just a little over a year.

Q. Now, coming down to the early morning of September 9th, were you on the highway that night beyond Goldendale? A. Yes, sir, I was.

Q. With whom?

A. I was with my buddy, Richard K. Swank.

Q. Were you driving? A. No.

Q. Swank was driving? A. Yes, sir.

Q. There were the two of you in the automobile? A. Yes, sir.

Q. Now, after you get below Goldendale and approached [139] the scene of this accident, tell the Court what happened; use your own words and tell what happened until you are stopped.

A. Well, sir, we had just left the carnival there at Goldendale just a little while before and we were shooting the breeze drivng a long there and went around this wide turn and we were looking up the road and talking, and all of a sudden we seen

(Testimony of Robert W. Merrill.)

this flashlight waving in the middle of the road, and so we started to slow down, and as we got a little closer we saw a woman lying in the roadway and thought we had better stop. And I told Swank we had better stop because I thought there had been an accident occurred, and so we pulled off to the side and off the edge as far as we could because it wasn't very far you could pull out, and asked what the trouble was and if we could help them one way or another, and "No, no, we are going up the road."

Q. Who said that?

A. This lady in the blue suit back there.

Q. Who was that?

A. This lady in the blue suit (indicating in courtroom).

Q. This lady right here?

A. No, over there in the first row in the blue suit.

Q. Miss Wilson, who testified here?

A. Yes, sir, she was on the stand. I don't know her name.

The Court: You may stand up, Miss Wilson.

Mr. Brown: Q. Is that the lady you mean?

A. Yes, sir.

The Court: Thank you.

Mr. Brown: Q. You and your buddy were in uniform?

A. Yes, at that time were in uniform there.

Q. And could you identify the woman who was down in the middle of the road?

A. Yes, sir.

(Testimony of Robert W. Merrill.)

Q. Who was that?

A. That is Mrs. Corbett.

Q. Go ahead.

A. So—Is it all right?

Q. Yes, go right ahead and tell what happened.

A. And so I got out of the car then and Swank turned around and told me, "You better get out of the road." And I went behind the car and said, "Are you having any trouble?" And she said, "No, no, going up the road."

Mr. Felton: We ask that this conversation be limited to any time that the plaintiffs or the deceased were present.

Mr. Brown: Q. During all this conversation Mrs. Corbett was present, was she?

A. Yes, sir.

Q. Was there a man with them?

A. Yes, sir, there was one man and two other women besides Mrs. Corbett. [141]

Q. What was the man doing?

A. Well, when we first got there this woman was lying on her back and screaming and kicking her legs and waving her arms and Swank and I asked this woman what was the matter, what was the trouble, and she said, "Oh, nothing, nothing." And I said, "You better get off of the road because you will be killed." And they said, "Okeh, okeh, we will get off the road." And this man was trying to reach down and pick up this woman and every time he would reach over and pick her up a little ways she would pull her arm away and get down and he couldn't get her straight up.

(Testimony of Robert W. Merrill.)

Q. Now, what was the condition of the man who was lifting the woman and the woman on the road as to sobriety?

A. Well, I would say that they definitely had plenty to drink?

Q. Were they drunk?

A. Yes, sir, I would say so.

Q. Go ahead and tell what happened; did you leave them in the road?

A. Well, sir, this fellow finally got the girl up and had her placed so her arms were like this and he was holding her up. Your Honor, may I use that?

The Court: You may refer to the position on the drawing to illustrate your testimony.

A. (Going down to blackboard): Well, they were standing [142] right in here when they got up finally.

Mr. Brown: Q. That is indicating about the center of the road?

A. Yes, that is right, and they were facing the road like that. Well, our car was parked right in here and I told Swank, I said——

Q. You can't say what you told Swank unless they heard you.

A. Well, we got back in the car. The moment we did that there was a car approaching from our rear and that was about a quarter of a mile from there when we saw it, and so we got in the car and started off because they got up and we thought they would go home, and so we started up.

(Testimony of Robert W. Merrill.)

Q. Started west?

A. Yes, sir, that is right, sir. And we saw these headlights coming our way.

Q. You saw a car approaching from the west going east?

A. Yes, just the opposite direction and we pulled up about twenty feet and I looked, was looking back to see if they had moved and I told my buddy, "You better stop."

Mr. Felton: You can't say what you told your buddy.

A. Well, I told him "stop" because they would be hit and we were moving about three or four miles an hour.

Mr. Brown: Q. Did you see the accident, the actual striking? [143]

A. Yes, I did.

Q. How did you happen to see it?

A. Well, I had a quartering view of it where I wasn't looking into any lights.

Q. How many people at that time were in the center of the road or in the roadway?

A. Well, right near the center of the road two or three feet from the white line this man was holding Mrs. Corbett, as I said; and, then, just a little further off to the edge of the road—now, wait a minute, I am getting ahead of myself—well, then this girl that had her hand out, she was standing there helping trying to get this fellow to get her out of I there, I think, and then another girl was two or

(Testimony of Robert W. Merrill.)

three feet from there and she was going over to the edge of the highway.

Q. Then, what happened; did you see the car strike them, just tell the Court what happened?

A. Well, sir, when this car hit this girl she had her leg out like this, Mrs. Corbett, and this guy was still holding her and he was trying to drag her and the car hit the two of them, and this fellow he seemed to go behind the car like that and shoot right out and I didn't see him after that, and this girl also went on in there.

The Court: It isn't clear to the Court where his position was at the time, Mr. Brown. [144]

Mr. Brown: Q. Could you indicate on there just where it was?

A. Well, at the time these two people——

Q. No, where you were?

A. Well, we had pulled in here just enough so we could see right across and I was looking back and the other car was showing up here pretty fast. Well, before it stopped Mr. Wilkerson's car moved on down past here and I saw this girl coming around this right side of there and she was spinning, oh, I imagine, two turns around before she got straightened around.

Q. Which girl was that?

A. I think that that was the one with the hand cut. I don't know just what her name is.

Q. All right, go ahead.

A. And I jumped out of the car and ran back to the accident and I went over to the ditch and

(Testimony of Robert W. Merrill.)

this guy was lying on the one side of the ditch and this girl was lying just to the side of him like this, and Swank and I got down in there and I put my hand on his chest and I got up and I told Swank that I thought he was gone, and I told this car—first, I went to the girl and her pulse was beating and I told Swank, “I think she is going to get through.” And I told the car that just stopped there, I said, “Get to the nearest place and call an ambulance.” [145]

Q. And that car that followed you called an ambulance? A. That is right.

Q. And you don't know who that person was, or haven't seen him since?

A. That is right. So, after that happened these other two girls were around there and one of them was crying and I didn't do anything. I was pretty scared there too and I told Swank, I said, “Let us go and get the car and move it off of the road.” Because there was quite a few cars coming and as we went to move the car off the road there was another car parked right in front of us, a convertible coupe right directly in front of our lane and it was partly on the gravel driveway and we had just room to squeeze in front and in there and I got out of the car and I walked up to the Corbett car and I opened the door and shook the man in there and——

Q. Who was in the car?

A. Mr. Corbett, and I opened the door and shook him.

(Testimony of Robert W. Merrill.)

Q. What was his position in the car? What happened?

A. When I opened the door he was lying back and I shook him and I said, "You better move this car off the road, there has been an accident down there." And so he didn't do anything and I walked down to the accident and he just looked at his watch and didn't do anything, and then I was staying down there and talking to Wilkerson and Wilkerson asked me for my name, and this Indian woman told me to keep my mouth shut and [146] I didn't think she should interfere.

Q. Who was that?

A. That is Miss Wilson and at first I didn't tell my name and then I told Wilkerson my name and he was shaking as bad as I was and he got my name written out finally, and somebody said that the highway patrol was coming and so we pulled out, and it was about twenty minutes to three.

Q. Did you see Mr. Whitaker get out there at all?

A. No, sir, I didn't see Mr. Whitaker around the accident at all.

Q. Then, from the time you first came up there until after the accident, this Indian car wasn't moved until after the accident, is that right?

A. That is correct. It was still in that position as we pulled out around twenty minutes later, and the last thing I said, I got around and hollered

(Testimony of Robert W. Merrill.)

out of the window and I said, "You better get that car out of the highway." And then we left.

Q. Now, you were overseas and there was some trouble with Miss Wilson about giving your name——

The Court: I didn't hear that question.

Mr. Brown: (Q.) There was some trouble with Miss Wilson about giving your name. You were in the service and his Honor was also in the service. Tell the Court why you didn't give your name. [147]

A. Well, "VJ" day had come and we were restricted and didn't get any passes as we were restricted and Swank and I were in the service a long time and we had our points to get out and get discharged and we wanted to get away and we said, "To the heck with them and we will flip a coin and see which way we will go." And that is the reason I didn't want to give my name to Mr. Wilkerson at first.

Q. Now, did you know any of the parties at all prior to the accident? A. No.

Q. Have you any interest whatsoever in the outcome of this trial?

A. No, sir, all I want to do is go back to work.

Q. And you are here on subpoena?

A. Yes.

Mr. Brown: That is all. Q. Oh, did you see any article of apparel picked up that night and put in the ditch, a shoe of something?

A. No, sir, I didn't.

Q. This Wilkerson car, as it approached you,

(Testimony of Robert W. Merrill.)

was there any indication that it was going at an excessive rate of speed?

A. No, sir, I would say around forty miles an hour.

Q. As you noticed the Wilkerson car, did it change its course at all?

A. Yes, sir, it made a change; it definitely did. The [148] officer has drawn it here—only my estimate—I didn't measure it or anything, I just looked at the skidmarks afterwards and I only estimated thirty to thirty-five feet of skid on it, but before he had any contact at all with these people his front wheels were at least one foot across that white line and he was going across the road.

Q. That white line you are referring to is the center line? A. The center line.

Q. The center line of the highway?

A. That is right.

Q. How far to their right of the center line would you say these two people were when they were struck?

A. I would say close to two and a half feet.

The Court: I don't believe that is very clear, Mr. Brown, what their right was. Do you mean the pedestrians' right.

Mr. Brown: Yes, I will straighten that out.

(Q.) How far to the south of the center line of the road were they?

A. Two and a half feet, around two and a half feet.

Mr. Brown: You may examine.

(Testimony of Robert W. Merrill.)

Cross Examination

By Mr. Felton:

Q. Now, Mr. Merrill, it is your testimony that they started skidding before they hit these people, is that it? [149] A. No, it isn't.

Q. Well, your testimony is that they were hit near the center line and you testified once that it was white and once that it was black. Which is it; white or black?

A. The center line was white.

Q. It wasn't black then. And your testimony is that they were hit near the center line. Will you mark on this chart up here that we have where the actual striking took place.

A. I would say right around in here.

The Court: May I suggest that it would make a better record if the corresponding mark be put on the exhibit, so there would be a record of it for the appellate court.

Mr. Felton: May the Clerk make that mark?

The Court: Is that agreeable with you, Mr. Brown?

Mr. Brown: Yes.

The Court: That is so we will have the same mark on the exhibit.

Mr. Felton: (Q.) Will you put your initial "M" where it was. A. Yes.

Q. Are you accepting the testimony of the state patrolman as to skidmarks now?

A. No, sir, I am not.

Q. Now, let us see if we could turn this thing

(Testimony of Robert W. Merrill.)

around [150] and examine it. Now, the position of the bodies is here, you understand?

A. This is the bodies.

Q. The position of the bodies are here.

A. I did not understand that. I understand that it wasn't there.

Q. Now, where did you understand the position of the bodies was?

A. I understand——

Mr. Brown: Well, it isn't a question of where he understands they were; let him draw it on there.

Mr. Felton: Let me conduct my own cross examination.

The Court: The objection overruled. He can testify with reference to this chart, where he saw the injured persons.

Mr. Felton: (Q.) Now, this point is 272 feet from the cross over, that is, from where the safety lines on the other side are. This point is 272 feet according to this chart. Now, where in your opinion were the skidmarks?

A. Well, sir, if the bodies are right here, is that correct?

Q. I am asking you where they are.

A. Well, I didn't go out there and measure it, sir.

Q. Now, you heard the state patrolman testify, didn't you? [151]

Mr. Brown: Now, if the Court please, I object to that. He saw the accident and counsel can't tie him down here.

(Testimony of Robert W. Merrill.)

The Court: What was the last question?

(Last question read)

The Court: He may answer the last question.
The objection overruled.

Mr. Felton: The state patrolman placed the marks here, you heard that.

Mr. Brown: Well, your Honor, he could have heard the testimony and not seen where he placed the marks.

Mr. Felton: (Q.) Did you hear the testimony this morning? A. Yes, sir.

Q. You were in the courtroom when the trial started? Yes, sir.

Q. What education have you got?

The Court: I didn't hear that.

Mr. Felton: (Q.) What education have you had? A. One year of college.

Q. In what course? A. Journalism.

Q. Journalism? A. Yes.

Q. Now, the testimony, as I understand it, the state [152] patrolman testified that the bodies were 272 feet from the point of vision of the cross over. Do you know what the point of vision is?

A. Yes.

Q. It is where the white line and yellow line are for passing? A. Yes.

Q. Now establishing this point as the point where the bodies were do you accept that as a proper point for the bodies or do you place them some place else?

A. If this is where the state patrolman said that

(Testimony of Robert W. Merrill.)

the bodies were lying and he has that point measured, I agree with him but the skidmarks would be further up here because the point of impact is somewhere right in here.

Q. Now put an "M" there, will you? Now, how near the edge of the road do you put the skidmarks?

A. Well, sir, they started out back in here some place.

Q. I mean, how close to the edge of the road were the skidmarks?

A. I didn't measure it. I did make a rough guess.

Q. Now, you understand that the direction of the death car is down, do you? A. Yes, sir.

Mr. Brown: Now, I didn't get that question.

The Court: Repeat the question. [153]

Mr. Felton: (Q.) You understand that the direction of the death car is down?

A. Yes.

Q. You understand that the place of the bodies is where the officer placed them?

A. Yes, sir.

Q. Did you place the position of the bodies at "M"?

A. Yes, sir.

Q. Make a little nob at "M." And you place the skidmarks along the highway, do you?

A. I show them back that way. I mean I did not measure them.

Q. How close to the white line did you say the skidmarks were?

A. I didn't measure that, I won't make a guess.

(Testimony of Robert W. Merrill.)

Q. How close to the shoulder would you say that they would be?

A. I wouldn't make a guess.

Q. Then, what you testified to is a guess?

A. No, sir, I know where these people were, I saw them right there.

Q. Now, that is approximately on that scale, that is approximately twenty-five feet, I should say east of the point where the bodies were?

A. No, sir,— [154]

Mr. Brown: Now, if the Court please, I want to object to that because the highway patrolman who drew that said it wasn't according to scale.

Mr. Felton: Yes, I know.

Mr. Brown: We can see ourselves that it shows 272 feet here as against 19 feet of pavement in this proportion.

The Court: I think that this objection will be sustained, referring to this diagram as a scale diagram because obviously it is not drawn to scale.

Mr. Felton: All right, we will not use it as a scale digram. (Q.) Now, you have placed the position of the bodies as being west of the point of impact?

A. No, sir, it should be east.

Q. Could you place it where it should be?

A. Sir, I have got one eye and I have got to see out of it.

Q. You can't see very well, then.

Mr. Brown: I think that is improper.

The Court: You may proceed.

(Testimony of Robert W. Merrill.)

Mr. Felton: Could you place it. Rub it off there and place it again. (Q.) Now, that is approximately even with the location of the bodies on the side of the road, is it not?

A. That is right, sir.

Mr. Felton: Sit down. (witness returns to stand.) (Q.) Now, which side of the car struck the bodies? [155]

A. The right side of the car, the front part.

Q. Then, you say that the patrolman was wrong on his skidmarks?

A. No, I didn't say. I said that I made my estimate. I didn't measure them.

Q. But you said that the position of the impact was nearer the white line than it was to the shoulder?

A. Yes, sir, I say that.

Q. And on the right side of the car?

A. Yes, sir.

Q. And at a position directly north of the bodies?

A. I would not swear to directly north. In that location.

Q. Well, what will you swear to, then; tell us the fact.

A. Due to the position of the Wilkerson car moving on forward, I couldn't say just how square they went across the road because my point of visibility was blocked from there where they were.

Q. Now, will you make a few marks "X" right there as to the location of the various people at the point of impact.

(Testimony of Robert W. Merrill.)

A. Where the two people were laying?

Q. Not the two people, where all the people were at the point of the accident.

Mr. Brown: Just a minute, if your Honor please, I can't understand what he wants. There were four people there. [156] What people do you want?

Mr. Felton: All four people.

The Court: I am not clear on the people you are referring to. Do you mean the people that were on the highway just before the accident?

Mr. Felton: Yes, just before the accident. I want the position of the four people.

The Witness: Well, sir, we were facing the north and this man was holding the woman, and they were about like this (illustrating), and this woman, Mrs.—Miss Wilson that got her hand hurt or cut, would be standing right about in here and this other woman was off in here someplace.

Mr. Felton: (Q.) Clear away from the car?

A. Yes, sir.

Q. The car never came near Jane White—Jane White is the elder of the two girls sitting back there.

A. Yes, sir, I say that.

Q. Now, the "X's" place your best story as to where they were? A. Yes, sir.

Q. Where was your car sitting right at the time? A. Right in here, sir.

Mr. Felton: You better mark another "M" in here. Sit down. (witness returns to stand).

(Testimony of Robert W. Merrill.)

Q. You stayed there for a little while and you came down? [157] A. Yes, sir.

Mr. Felton: How long do you wish to continue this afternoon.

The Court: I beg your pardon?

Mr. Felton: How long is it your desire to continue this afternoon, your Honor?

The Court: We will proceed until four-thirty.

Mr. Felton: (Q.) Now, Mr. Merrill, how old are you? A. Twenty-two.

Q. Where do you live?

A. Los Angeles, California.

Q. What is your present occupation?

A. I am in the Sales Department of the Fibre-board Products Company.

Q. And you gave your name and address to Mr. Wilkerson that night, did you not; or did you refuse to?

A. I gave it to him, yes.

Q. Where is your buddy Mr. Swank, whatever his name is; is he here?

A. No, sir.

Q. Where is he?

A. I don't know, sir; he was discharged.

Q. How did you happen to come up here to this trial?

Mr. Brown: If your Honor please, that is objected to.

Mr. Felton: To show interest, your Honor. [158]

The Court: The objection overruled.

(Testimony of Robert W. Merrill.)

Mr. Felton: (Q.) How did you happen to come up here to this trial?

A. The—I can't remember his name—the attorney sent for me.

Q. Which attorney? A. Mr. Semm.

Q. How did he contact you?

A. By wire.

Mr. Brown: If the Court please, again, it is wholly immaterial. There is no suggestion here of what he is trying to get at but I think it is improper.

The Court: He can show how he came here, as bearing on interest.

Mr. Brown: As to who brought him here?

The Court: You went into that, Mr. Brown. You may proceed.

Mr. Felton: (Q.) And had he contacted you before?

A. No, sir—You mean before I came up here; no, sir?

Q. How much are you being paid to come here?

A. Well, I haven't been paid anything.

Q. Are you coming up here on your own money?

A. No, sir, the Company paid my expenses here.

Q. What company?

A. Aetna Casualty Insurance. [159]

Q. How much did they send you?

A. They didn't send me anything, sir.

Mr. Brown: Now, if the Court please, that is improper.

(Testimony of Robert W. Merrill.)

The Court: The answer with reference to insurance companies will be stricken.

Mr. Brown: That is what he is trying to bring in here.

Mr. Felton: I simply asked for the amount of money and he threw in this thing.

The Court: Yes, I understand.

Mr. Felton: I don't think we will get it out now, and——

Mr. Brown: I object to the statements that this boy has been paid to come here.

The Court: If counsel will talk one at a time.

Mr. Brown: I object to the statement that he won't get it out of this boy. This witness is entitled to protection. He is a wounded veteran here. He is fixing a money price on his coming here and it is wholly improper.

Mr. Felton: I submit, your Honor, that I have conducted myself as a gentleman and a member of the bar, and I assure you I will continue to do so.

The Court: You may proceed.

Mr. Felton: How much have you received so far on this? A. My expense money.

Q. How much?

A. \$53.88 for expenses. [160]

Q. How much are you going to receive on this contract?

Mr. Brown: If the Court please, I object to that, there is no contract.

(Testimony of Robert W. Merrill.)

The Court: The reference to the contract will be stricken.

Mr. Felton: How much more do you expect to receive out of this trip?

A. I expect to receive wages for what wages I have lost and my expenses home.

Q. And how much is that to be?

A. I don't know how much that will be because I don't know how long I will be here.

Q. How long have you been here?

A. Saturday—I arrived in Yakima yesterday.

Q. Oh, you came to Portland on Saturday?

A. That is right, sir.

Q. And you say you gave your name to Wilkerson?
A. That is right, sir.

Q. And were you at the scene of the accident until the state patrolman came up?

A. No, I wasn't, sir.

Q. Now, Wilkerson had your name from that night on, didn't he?
A. I don't know, sir.

Q. Did you later write Wilkerson after you went out [161] of the service?
A. No, sir.

Q. How did these people contact you?

A. Through an adjuster in the company.

Q. Through what?

A. Through an adjustor.

Q. They looked up your Army record and where you got out. What address did you give Wilkerson?

A. Well, I gave him my Army address. When you are discharged the Army will forward all mail.

(Testimony of Robert W. Merrill.)

Q. I mean, was there any mail forwarded, is what I am asking you? A. No, sir.

Q. Then you were a military policeman for a year? A. Yes, sir.

Q. Are you familiar with the rules of the courts that when you reside beyond one hundred miles you can refuse to attend upon subpoena?

Mr. Brown: Now, if the Court please, I object to that. What difference does it make. He doesn't have to come, that is true. I don't know of any such rules as far as the Federal Court is concerned.

The Court: The objection is overruled. He is asking if he knows.

Mr. Brown: What if he doesn't. [162]

The Witness: No, sir, I have never been in court before.

Mr. Felton: Q. You have never been in court before at all?

A. Not in the Federal Court, no, sir.

Q. Now, you are satisfied that Levi Frank, the dead man, was very, very intoxicated at the time you saw him just before the accident?

A. I don't say as to how intoxicated he was, they were, I would say very much so.

Q. Well, the smell of liquor was very noticeable on him?

A. I was never close to Levi Frank except to feel his heart after the accident.

Q. Well, could you smell liquor on him?

A. No, sir, I didn't smell liquor on Levi Frank. I didn't say that.

(Testimony of Robert W. Merrill.)

Q. Then, you don't know whether Levi Frank was drunk or not?

A. His actions is the only thing I could go on.

Q. Well, you testified that he acted like he was drunk. Now, what actions committed you to this finding?

A. Well, when he grabbed this girl and she pulled him down and he got her up a little ways and she was down and he finally got her up. [163]

Q. Now, who else are you satisfied were intoxicated there?

A. Both of the other women besides Mrs. Corbett.

Q. Now, to what extent did that intoxication go?

A. Well, apparently so much so that they don't remember anything.

Q. Well, now, you may answer my question, Mr. Witness, and tell me about the intoxication there.

A. They thought we were police to begin with.

Mr. Felton: I don't want to know what you think they thought. Just answer the question.

The Court: Just a moment, just answer the question that counsel asks you.

Mr. Brown: Well, your Honor, I insist that that is answering his question. He said: What other evidence of intoxication, and the witness said that they thought they were policemen.

The Court: That isn't responsive, Mr. Brown.

Mr. Felton: Q. Well, give their physical—not mental—their physical aspects of intoxication.

A. Well, stumbling around the road up there.

(Testimony of Robert W. Merrill.)

Q. Did you smell liquor?

A. Yes, I did on the two women.

Q. Very strongly? A. Yes. [164]

Q. It was quite pronounced? A. Yes, sir.

Q. It was unmistakable?

A. Yes, sir, on the girls.

Q. And it was unmistakable on Levi Frank, also?

A. Well, sir, as I have stated, I did not get up close enough to him to smell that.

Q. They were together?

A. I understand that, sir, but these two girls tried to get us to go because they thought we were police.

Q. And you were military police, weren't you?

A. Yes, sir.

Q. You said that at that time you were A.W.O.L.? A. Yes, sir.

Q. And you were on a party?

A. I didn't say anything about a party, no, sir.

Q. Well, you were going out from the base. I am not talking about liquor. I am talking about a party. You were on French leave. You were going out to have some fun? A. Certainly.

Q. You didn't go out to play marbles; you wanted to have some fun?

A. I might have—we wanted to have some fun.

Q. You wanted to do such things as soldiers usually do when they went out like that? [165]

Mr. Brown: Objected to, if the Court please, as to what soldiers usually do.

The Witness: No, sir.

(Testimony of Robert W. Merrill.)

Mr. Felton: I spent enough time in the Navy to know about that.

The Court: You may answer.

The Witness: Well, during the time we were gone we didn't do anything more than when we were not A.W.O.L.

Q. Did you have a drink that day?

A. Yes, sir, I did.

Q. And how long before the accident was the last drink you had?

A. At Ephrata, Washington.

Q. Did you have any liquor in the car?

A. Yes, sir.

Q. What liquor did you have in the car?

A. What did we have in the car?

Q. What liquor?

A. We had some in the suitcase.

Q. And you had been drinking constantly for how many days?

A. No, sir, we had not been; I had been on twenty-four hour shift and came off just that day.

Q. How many hours; how long had you been off?

A. When we were down there I went off at noon time. [166]

Q. This was midnight? A. Yes, sir.

Q. And how many drinks did you have at Ephrata? A. Two or three drinks.

Q. And were there any other liquors, wine, beer, or anything of that nature that you drank between Ephrata and the scene of the accident?

A. We didn't have anything to drink and we

(Testimony of Robert W. Merrill.)

were saving it for later. At that time liquor was rationed.

Q. What was your conveyance?

A. A Ford automobile, a convertible sedan.

Q. Whose automobile?

A. What was your question?

Q. Whose automobile?

Mr. Brown: Objected to, if the Court please, what difference does it make.

The Court: I think that is going far afield. The objection will be sustained.

Mr. Felton: The other fellow was driving, wasn't he?

A. That is right.

Q. There was a thirty-five miles an hour speed limit at that time, was there?

Mr. Brown: Objected to, if the Court please.

Mr. Felton: Q. Do you know if there was or not? A. Yes, sir, there was. [167]

Q. And this car that was coming over the hill was traveling above that rate of speed, this car of Wilkerson's? A. I wouldn't know.

Mr. Brown: If the Court please, I want to object to that. I think that in the first place while I am a lawyer and supposed to know what the law is I have very distinct recollection that the attempt to regulate speed limits went off prior to that time, and I want to object to the question asking in regard to the legal speed limit under these circumstances, which even a lawyer if we put him on the stand could not answer.

(Testimony of Robert W. Merrill.)

The Court: I think I will sustain the objection as to the legal speed limit. If he attempts to testify to the speed of the car, that will be proper.

Mr. Felton: Q. Now, you have only one eye?

A. Yes.

Q. Which eye? A. My left eye.

Q. And your left eye is your good eye?

A. Yes, sir, that is right.

Q. And you were sitting to the right of your buddy in the car? A. That is right.

Q. And then you came along and admonished these people on the road and then you drove along and you admonished these [168] other people and then you went on your way?

A. How is that? Would you repeat that?

Q. You went along there and went up and admonished these first people on the road what to do and you admonished these other people what to do and you went on your way, didn't you?

A. No, I didn't.

Q. Well, you testified you went down the road?

A. Well, we told them that they had better get off of the road or they would be killed and then we went down the road.

Q. And then you went down the road to these other people? And then you left there, didn't you?

A. Not until thirty minutes after the accident.

Q. Now, that is the time you admonished these people as to getting off of the road?

A. Which people are you talking about?

(Testimony of Robert W. Merrill.)

Q. These people in the car.

A. It was five or ten minutes after the accident before we went up to the automobile.

Q. Did you walk or ride?

A. We went in the automobile up there.

Q. And you say you went up there five or ten minutes after the accident?

A. I would say that we did, yes. [169]

Q. You drove up? A. Yes.

Q. And you admonished these people to get off of the road and told them what they should do and got in your car and after the accident you got out of your car and then five or ten minutes later you got in your car and drove up to where these people were and admonished them to get off of the road and——

A. I got lost on the way, I didn't follow you.

Mr. Felton: Will you read the question.

(Last question read.)

The Court: I think you better reframe the question.

Mr. Felton: Q. Then, the way this thing happened was this, according to your testimony: You came down the road and you pulled up by these three Indian girls and you talked to them and you told them what they should do, and you stayed around there a little while and then you got in your car and you pulled up to a vantage point about half-way up to the automobile so that you would have a good view of this oncoming accident——

A. No, sir.

(Testimony of Robert W. Merrill.)

Q. Wait a minute, until I get through. And then, when the accident happened that you were waiting for——

Mr. Brown: If the Court please, I am going to object to this question as—— [170]

The Court: Let him finish his question.

Mr. Felton: Are you through?

Mr. Brown: Go ahead.

Mr. Felton: (Continuing): When the accident happened that you were waiting for, you went back and looked over the situation and got her shoe and put it there where she was and you went back to the car and drove up and told the other car where to go and went back to your car and drove off?

Mr. Brown: That is objected to, if the Court please.

The Court: The objection sustained. It is not a proper question; being too long and involved, also.

Mr. Felton: Q. This place of stopping was somewhere east of the scene of the accident, wasn't it?

A. No, sir, it was just about directly north of it.

Q. That was on the other side of the road?

A. Well, we just talked to these people, as I said, and I was out of my car, or out of Swank's car.

Q. Did he get out?

A. No, sir, he wasn't out.

Q. And how long did you stay and talk to them?

A. Just a few minutes.

Q. And you drove up to a point about halfway

(Testimony of Robert W. Merrill.)

between that point and where the other car was parked? A. No, sir.

Q. Where did you drive? [171]

A. We only made it to a point north of the accident about thirty feet, not over thirty-five feet.

Q. And then you stopped again?

A. No, sir.

Q. You were still moving when the accident happened? A. Three or four miles an hour.

Q. You were going just about that speed when the accident happened? A. Yes.

Q. Why were you moving about three or four miles an hour?

A. Because I hollered to him to stop.

Q. What?

A. Because I hollered to him, "Stop."

Q. And you moved about one hundred feet?

A. No.

Q. How far did you move?

A. About twenty-five or thirty feet.

Q. And you were only twenty-five feet west of the accident at the time the accident happened?

A. That is right.

Q. And, then, you stopped?

A. That is right.

Q. And then what happened?

A. We got out and went back to the scene of the accident. [172]

Q. How long did you remain stopped there?

A. Well, as I said, we were just there just a

(Testimony of Robert W. Merrill.)

few minutes before we went over to move our car and went up behind the other car.

Q. And then you moved your car up to where the other car was? A. That is right.

Q. And you parked and told the other fellow to get off of the road?

A. That is where I tried to wake him up.

Q. You got the car off of the road?

A. It never was off of the road while we were there.

Q. Then, where did you park your car?

A. Our car was sitting behind the other car.

Q. Ahead of Mr. Corbett's car or behind him?

A. No, sir, behind it.

Mr. Felton: I don't think there is any possibility of finishing with this witness at adjournment. I am going ahead with this witness for quite a while.

The Court: The Court will adjourn until tomorrow morning at ten o'clock.

Morning Session, May 9, 1946, 10 o'clock a.m.

The Court: Mr. Merrill is still on the witness stand, I believe. [173]

Mr. Felton: Yes, your Honor.

Q. Mr. Merrill, you stated that you were in the Air Corps, did you not? A. That is right.

Q. And you stated that you were a navigator on a B-17? A. That is right.

Q. Now, how long was your training period before you went into a B-17?

(Testimony of Robert W. Merrill.)

A. We got most of our training in Anchorage, Alaska.

Q. Now, from the time you went into the Army how long was it before you went to the Aleutians?

A. Well, I went in August the 13th in 1941, and September 27th we were in Ketchikan, Alaska, in 1941, and then we left there and went to Metlakatla.

The Court: A little louder.

A. We left Metlakatla in April, 1942.

Mr. Felton: Q. How long were you in the Army before you went to the Aleutians, in months?

A. Approximately eleven months.

Q. About eleven months before you went to the Aleutians? A. That is right.

Q. You had, according to your story, a buddy named Richard K. Swank?

A. Richard K. Swank.

Q. Is that his correct name?

A. Yes, that is right. [174]

Q. What was his rating or rank in the service?

A. Staff Sergeant.

Q. Staff Sergeant? A. Yes, that is right.

Q. What is his home town, Topeka, Kansas?

A. Yes, that is right.

Q. Have you got his home address?

A. No.

Q. Where was he last stationed?

A. Ephrata, Washington.

Q. That is where he was discharged from?

A. I don't know where he was discharged.

(Testimony of Robert W. Merrill.)

Q. What I want is specific information so that I can get his address.

A. I have nothing.

Q. Have you corresponded with him since you have been out of the service?

A. No, sir, I haven't.

Q. Then, his last address, so far as you know, was Staff Sergeant Richard K. Swank, Army Air Corps, Ephrata, Washington, is that it?

A. That is right.

Q. And he was attached to what unit there?

A. 430th Base Unit.

Q. 430th what? [175]

A. 430th A.A.F. Base Unit.

Q. Now, he was driving the car on the early morning of the 9th of September, was he?

A. Yes.

Q. What kind of car was that?

A. A '39 Ford Convertible Sedan.

Q. What was his state of registration?

A. He had California plates on it.

Q. And what was his California license number?

A. I don't know his license number.

Q. Was that his car? A. Yes, it was.

Q. Do you know from what time in California that had been licensed?

A. No, sir, I don't know.

Q. Have you any way of giving me any further information to trace the identity and present whereabouts of that car?

A. No, I would have no way of doing that.

(Testimony of Robert W. Merrill.)

Q. You say that we can possibly get in touch with him by writing the Army through this information you have given us?

A. No, I didn't say that.

Q. I say, do you think we can?

A. I don't know. I don't know just how they operate upon things like that.

Q. You said yesterday that the mail is always forwarded? [176]

A. Yes, it should be but his separation base should always have his forwarding address.

Q. Did you leave him at Ephrata?

A. Yes, that is right.

Q. Do you know what his separation base was?

A. No.

Q. What was your own rank in the service?

A. Well, I had several.

Q. Well, what was your rank at the time you were a navigator in the B-17?

A. Tech Sergeant.

Q. What Tech Sergeant, what rank; there are several Tech Sergeants, aren't there?

A. No, just Technical Sergeant.

Q. Technical Sergeant. How many stripes did you have on your sleeve?

A. Five. I think you are also thinking of Technician. There is the Technician class, but I think it is Technician Five.

Q. Were you a Tech Five, or what were you?

A. I was a Technical Sergeant.

(Testimony of Robert W. Merrill.)

Q. Where did you take your training to be a navigator?

A. At Elmendorf Field, Anchorage, Alaska.

Q. Then, when you were back in the military police, what was your rating or rank? [177]

A. P.F.C.

Q. Now, how did you get from a Tech Five to a P.F.C. A. No, I wasn't a Tech Five.

Mr. Brown: That is a Technician. He was of Sergeant rank. He was Technical Sergeant.

The Court: Technical Sergeant was what he was.

Mr. Felton: I am not familiar with that information. I am trying to get the information so that I can go into this.

Q. How did you get to be a P.F.C. from a Tech Sergeant; how did you get demoted?

A. I arrested a colonel three times at Portland, Oregon.

Q. What?

A. I arrested a colonel three times.

Q. And they broke you for it?

A. That is right.

Q. How many times were you broken from a higher rank to the lower rank while you were in the service? A. Twice.

Q. When did you lose your points and—

Mr. Brown: I think this is wholly immaterial.

The Court: I am going to sustain the objection to that question. I can't see the materiality of it at all.

(Testimony of Robert W. Merrill.)

Mr. Felton: Q. Have you got a copy of your discharge certificate with you? A lot of men carry them in their wallets, that is the small discharge cards. [178]

(Witness hands wallet to counsel.)

Mr. Felton: May I take it a minute, your Honor. Will you take your other material out so I can see the back.

The Witness: There is no other material. There is only one side.

Mr. Felton: Q. This reads that you were discharged as a Private First Class, is that true?

A. Yes, sir, that is right.

Q. Now, in your work as a navigator you were familiar with maps and charts and drawings, were you not? A. How is that?

Q. In your work as a navigator you were familiar with maps and charts and drawings?

A. That particular part of the country, yes.

Q. No, but you learned how to do mapping?

A. Yes.

Q. And your maps were a great deal more involved than this map on the board?

A. Yes, very considerably.

Q. This is a very simple drawing, is it?

A. Yes, sir.

Q. And you have no trouble reading this?

A. Yes, sir, the way that that is drawn I sure do, due to the fact of the skidmarks on the highway.

Q. You know what the patrolman meant by it, do you? [179] A. Sir?

(Testimony of Robert W. Merrill.)

Q. You know what the patrolman meant by it?

A. Well, the way I looked at it, it was different from that, the way it was drawn there.

Q. Well, I know, not the effect, but you know what the meaning of the map is? A. Oh, yes.

Q. When you came upon these people in the highway you had no trouble seeing them, did you, when you first came driving up there?

A. No, they were waving a flashlight in the road.

Q. And they were perfectly apparent to you, were they?

A. When we got up beside them, sure.

Q. Well, you could see them down in the road with your light? A. Not too far.

Q. Well, you could see them far enough to stop?

A. That is right, sure.

Q. And you did see them far enough and you did stop, didn't you? A. That is right.

Q. Now, I believe you stated on direct examination that you got out of the car there, and then you saw a car approaching about a quarter of a mile from the rear and you got back into your car, that is the first time now you got [180] out of your car.

The Court: Is that a question, Mr. Felton, or just a statement?

Mr. Felton: No, that is a question. I meant it for a question.

The Court: Are you asking him whether or not he testified to that?

Mr. Felton: Yes.

(Testimony of Robert W. Merrill.)

Q. You testified to that?

A. Yes, that is when we first talked to them.

Q. And you were on the north side of the road, were you?

A. That is correct.

Q. And so you pulled up to a position opposite to these people and stopped?

A. Yes, sir.

Q. And you told them that they better get out of the road, and they said, "okeh"?

A. No, they didn't say "okeh."

Q. You are sure that they didn't say "okeh"?

A. That is right.

Q. Now, didn't you testify yesterday as follows: "Well, when we first got there this woman was lying on her back and screaming and kicking her legs and waving her arms and Swank and I asked this woman what was the matter, what was the trouble, and she said, 'Oh, nothing, nothing.' And I said, 'You better get off of the road because you will be killed.' [181] And they said, 'Okeh, okeh, we will get off the road.'" Didn't you testify to that yesterday?

A. Not in those exact words.

Q. You did testify yesterday that way or not?

A. That is right; that isn't the exact language that I remember. I don't remember whether it is or not. I can't swear to the exact words. I can't remember all that but there was similar language to that.

Q. I am asking you what you testified to yesterday.

A. If that is what I said, then that is what I said.

(Testimony of Robert W. Merrill.)

Q. Then, you pulled ahead and—when you were in the car you pulled ahead just enough so that you could see right across to where the accident was, didn't you? A. As I looked back, yes.

Q. You were just a few feet north and west of the point of impact, weren't you?

A. Twenty or thirty feet, between there.

Q. What was the condition of your lights?

A. We had no lights.

Q. On your car? A. That is right.

Q. And that was pointed down the road?

A. That is correct.

Q. And you saw the car coming from down the road? A. That is correct. [182]

Q. And you had warned these other people or didn't; what warning did you give these other people that this other car was there?

Mr. Brown: Objected to as immaterial.

The Court: I will sustain the objection. Are you asking whether he did warn the approaching car that the car was there?

Mr. Felton: That is the Wilkerson car that was approaching over the hill.

The Court: I will sustain the objection. It is not material.

Mr. Felton: Q. This car that was behind you here, that is coming east of you before you started to move at all was about a quarter of a mile back of you, is that right?

A. I would judge similar to that.

(Testimony of Robert W. Merrill.)

Q. It was traveling at an ordinary rate of speed, was it?

A. I don't know just how fast it did go.

Q. From the time you saw it a quarter of a mile back until the time it reached you how long did it take?

A. I don't know. Until I got back to the car.

Q. Then, your actions, from the time you saw it a quarter of a mile back and the time you got back in the car and started up, you had to go back into the car? A. That is right. [183]

Q. All right, tell me what you did from the time you first saw it, tell me what you did, if you can.

A. I ran back and got back in the car just a minute there, and I was still looking back over my shoulder and I could see pretty good due to the fact that there was no top on our car and this other car was approaching from the other direction and I told him to stop and it didn't quite stop.

Q. When did this other car come up is what I want to know, this west-bound car, is what I want to know.

A. This car behind us stopped when the Wilkerson car was slightly across that white line.

Q. Now, you were a navigator and you are used to figures—

Mr. Brown: I can't hear that question.

Mr. Felton: Q. You were a navigator and you are used to figures. The highway speed was approximately forty miles an hour, was it?

A. I said I can't judge it at all.

(Testimony of Robert W. Merrill.)

Q. And thirty miles or forty miles an hour and a quarter of a mile back——

The Court: I didn't get the question.

Mr. Felton: I will withdraw the question so that there is nothing before the Court.

Q. Where you stopped at the time of the accident was on the highway, was it?

A. Well, we were off just a little bit but not much. [184]

Q. There was only a two-foot shoulder on the north side? A. That is right.

Q. But where you stopped was mostly on the highway? A. That is right.

Q. And you only had one eye on the car, is that right? A. Yes.

Mr. Felton: I thought I might be confused. That is all.

Redirect Examination

By Mr. Brown:

Q. Mr. Merrill, referring to this plat, are you conscious of the fact that on this so-called map a distance of 272 feet is represented by the same actual distance on the plat as the width of the highway which is nineteen and a half feet, so that the perspective is entirely off? A. Yes, sir.

Q. Mr. Merrill, in your discussion with Mr. Wilkerson while Miss Wilson was there, did Miss Wilson tell you at that time that she was a school teacher?

Mr. Felton: If the Court please, we object to

(Testimony of Robert W. Merrill.)

that as incompetent, irrelevant and immaterial. It is incompetent because it wasn't in the hearing of either the deceased or of Martha Corbett.

The Court: The objection will be overruled.

Mr. Brown: You may answer.

A. Yes, sir. At that time she stated that she was a school teacher.

Q. And you had left before the highway patrolman had arrived there? A. That is correct.

Mr. Brown: That is all. Oh, just one more question, pardon me. Just one minute.

Q. Did you last evening make an effort again to locate Mr. Swank—is that his name—your buddy?

A. Yes. We were down the street and we saw a car very similar to his, the exact model, but he got away before we could whistle or yell. We thought it might be his car.

Q. Have you any idea where he was or has been since that time?

A. Well, one of our other buddies that is discharged is in Los Angeles and before I came up here I asked if he knew where Swank was.

Q. You don't have to go into the conversation.

A. And he told me that he thought he might be somewhere in Seattle working in the steel plant.

Q. And you have passed that information on here to Mr. Senn the representative of Wilkerson?

A. Yes, I have advised him, and he has talked to me.

Q. And do you know whether they have made an effort to [186] locate him?

(Testimony of Robert W. Merrill.)

A. I so understand.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

W. R. WOODWARD,

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. You were the Sheriff of Klickitat County on September 9, 1945? A. That is right.

Q. And as such you have made an investigation of this accident? A. I was there, yes.

Q. And what time did you get there?

A. I believe around two a.m.

Q. Were you with the state patrol officer?

A. We went down at the same time, yes.

Q. And you were with him?

A. That is right.

Q. And, then, you went on to the hospital, did you, later? A. At The Dalles, yes. [187]

Q. Now, Sheriff, in your capacity as peace officer, have you had occasion from time to time to investigate accidents of this nature? A. Yes.

Q. And either you or your deputy assisted in the measuring of these marks on the highway?

A. Yes, not completely but pretty well.

(Testimony of W. R. Woodward.)

Q. And the purpose of your investigation was to determine what?

A. Well, generally, on an investigation of that type we try to determine if there is any criminal action to be taken, whether we should make an arrest or not.

Q. You haven't any independent recollection of how long these marks were; do you know how long they were? A. The skidmarks of the car?

Q. Yes, the tire marks.

A. No, I am sorry, I lost my notes on that.

Q. The state officer has testified that they were sixty-three feet, that the sixty-three feet of marks were the tire marks or skidmarks. What would that indicate as to the speed of the car?

Mr. Felton: If the Court please, I don't believe that the witness has qualified himself sufficiently to judge the speed. I think that the Court is as fully capable of judging these skidmarks as anybody.

The Court: I will sustain the objection.

Mr. Brown: Q. Did you talk to these Indians that night?

A. Part of them, yes.

Q. Did you talk to Mr. Titus Corbett, the Indian sitting at the table here, whose wife was the injured woman?

A. Just a moment. Yes.

Q. And did you talk to this girl, Miss Wilson? Will you rise. This girl? A. Yes. Yes.

Q. Did you? A. Yes.

(Testimony of W. R. Woodward.)

Q. What, if anything, was said by them relative to drinking, prior to the accident?

Mr. Felton: If the Court please, the conversation I think should be limited to the conversation with one of the parties.

Mr. Brown: Well, with Titus Corbett first, with the man first.

Mr. Felton: And where and when was the conversation.

Mr. Brown: I don't think I have to tie it down.

Mr. Felton: You have got to tie it down to the position in the road.

The Court: I think if you place it at the scene of the accident at the time he was there. [189]

Mr. Brown: All right, at the scene of the accident.

The Witness: Will you ask that question again, please.

Mr. Brown: Q. What, if anything, was said by Titus Corbett at the scene of the accident with reference to drinking, their drinking?

A. I did not talk to him at the scene of the accident.

Q. Did you talk to him later at the hospital?

A. Yes.

Q. What, if anything, was said at The Dalles Hospital? A. Nothing.

Q. Now, as to Miss Wilson, what if anything was said by her?

Mr. Felton: If the Court please, we object to

(Testimony of W. R. Woodward.)

the question as incompetent. It isn't binding upon these plaintiffs.

Mr. Brown: No, but it does go to the testimony of the witness Miss Wilson.

Mr. Felton: The foundation has not been laid. The foundation for any conversation wasn't laid. She wasn't asked for any conversation with any sheriff.

The Court: The objection sustained. I don't recall any foundation being laid as to the witness as to any conversation with the sheriff.

Mr. Brown: Well, then, I will excuse this witness and recall Miss Wilson for cross examination.

Mr. Felton: Well, now, you can't recall Miss Wilson for cross examination.

Mr. Brown: Yes, I can recall her for cross examination.

Mr. Felton: If the Court please, we object to his recalling Miss Wilson for cross examination. If he wants to he can call her as a witness, otherwise.

The Court: I think that the case has been closed and the defendant can't recall her for cross examination now.

Mr. Brown: Apparently, they don't want this in, Sheriff. That is all.

Mr. Felton: If the Court please, we ask that that remark be stricken from the record.

Mr. Brown: That is all. Oh, say, Sheriff, just a minute. Q. Could you tell from their appearance of these Indians whether they had been drinking, their appearance and their actions?

(Testimony of W. R. Woodward.)

Mr. Felton: Now, which Indians?

Mr. Brown: Any of the Indians that you talked to.

Mr. Felton: If the Court please, we object to this question as being too general.

The Court: I will permit him to answer the question, and then he can particularize, if he can, afterward.

The Witness: Well, all I can answer is what I think about it.

The Court: Based upon your observation. [191]

Mr. Brown: Q. Yes, based upon what you saw.

A. Yes, I think part of them had been drinking.

Q. Now, was that true of Titus Corbett?

A. I would say no.

Q. Was that true of Miss Wilson?

A. I would say yes.

Q. And the other girl that was sitting alongside of Miss Wilson?

A. I am sorry I can't place her.

Q. Of course, the plaintiff Mrs. Corbett, was she unconscious?

A. I don't know, I didn't see her.

Q. You didn't see her? A. No.

Q. Did Mr. Corbett explain to you why they were out on the highway? A. No.

Q. And did any of these Indians explain to you why they were out in the highway?

A. Yes, yes.

(Testimony of W. R. Woodward.)

Q. Now, which one explained to you why they were out in the highway?

A. Miss Wilson, as I remember.

Q. What explanation did she give you as to why they were out in the highway? [192]

Mr. Felton: If the Court please, we object to that as hearsay.

The Court: The objection will be sustained. Miss Wilson isn't a party to the action.

Mr. Brown: Pardon me?

The Court: Objection sustained. Miss Wilson isn't a party to the action.

Mr. Brown: I know, but Miss Wilson has testified as to the reason she was out on the highway and I can show that she made a statement directly contrary to that. It will be part of the *res gestae*. She has made a statement as to the reason she was out on the highway and now if she made a statement contrary to that I think I would be entitled to show it.

Mr. Felton: May I make a statement. I still think that the way to lay the foundation for an impeaching question is to ask the witness directly whether or not she made such a statement at the time and place with such persons present and then the witness in all good faith has a right to affirm or deny or explain the circumstances. This has not been asked of Miss Wilson and the proper foundation for this impeaching question has not been laid. He cannot contradict a person that is not a party as to an immaterial statement.

(Testimony of W. R. Woodward.)

The Court: My ruling will stand. I will sustain the objection.

Mr. Brown: That is all. [193]

Mr. Felton: Now, there is just one question.

Cross Examination

By Mr. Felton:

Q. Did the prosecutor come down to the scene of the accident that night?

A. Not that I know of.

Q. Did the coroner go down to the scene of the accident that night?

Mr. Brown: Objected to as not proper cross examination.

The Court: What was the question: Did the coroner go down to the scene of the accident that night.

Mr. Felton: Yes did the coroner go down to the scene of the accident that night.

The Court: He may answer.

The Witness: Not that I know of.

Mr. Felton: Q. Who gave permission to move the deceased Levi Frank?

A. Well I guess we just kind of took that on our own shoulders.

Q. What?

A. I guess we just took that on our own shoulders.

Mr. Felton: That is all.

(Testimony of W. R. Woodward.)

Redirect Examination

By Mr. Brown:

Q. As a matter of fact who is Z. O. Brooks?

A. He is acting prosecuting attorney for Klickitat County.

Q. And in Klickitat County the prosecuting attorney is also coroner? A. That is correct.

Q. And you made a report to him?

A. A verbal report.

Q. And do you remember the coroner signing the death certificate? A. No, I don't.

Q. You don't remember it? A. No.

Mr. Brown: Will you mark this for identification.

(Whereupon, certificate marked Defendants' Exhibit No. 1 for Identification.)

Miss Bacharach: May I see that.

The Court: He is just identifying it.

Mr. Brown: Q. Referring to this Identification 1, I will ask you what that is.

A. Well, that seems to be a report.

Q. By the coroner?

A. By the coroner.

Q. It isn't an original report?

A. I take it that it isn't. It is marked "copy".

No it isn't. [195]

Q. Now, reading that over, I will ask you if that is the report that you made to the coroner?

A. That is substantially the report.

(Testimony of W. R. Woodward.)

Mr. Brown: I am not offering this at this time, your Honor. It is apparently a copy.

Mr. Felton: May I see it so I will know what evidence is going in in this courtroom.

Mr. Brown: I wasn't offering it because I will have to get Mr. Brooks here. That is all.

The Court: Do you have any further questions.

Mr. Felton: No, I have no further questions.

(Witness excused.)

Mr. Brown: I will call Mr. Monahan.

ROBERT MONAHAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Where do you live, Mr. Monahan?

A. Wishram, Washington.

Q. What is your occupation?

A. I am a brakeman on the railroad.

Q. What railroad? A. S. P. & S. [196]

Q. Wishram is a railroad town?

A. Yes, sir.

Q. Were you with the defendants in this case, Mr. and Mrs. Wilkerson on the evening of September 8, 1945? A. Yes, I was.

Q. How long were you with them that evening?

A. Oh, since about—about nine o'clock in the evening, I guess.

(Testimony of Robert Monahan.)

Q. Now, just some time prior to one o'clock were you on the highway with them at the scene of this accident? A. Yes, I was.

Q. How many were in the defendants' car?

A. Six.

Q. And just who were they and how were they seated?

A. Well, there was Mr. Wilkerson, the driver, and his wife sitting in the middle and I was sitting beside his wife.

Q. That is in the front seat?

A. Yes, in the front seat.

Q. Who was in the back seat?

A. My wife—

Mr. Felton: Will you for my benefit speak up a little bit.

A. My wife was sitting on the right hand on the outside and Mrs. Chittester was sitting in the middle and Mr. Chittester was sitting on the other side. [197]

Q. Now, as you approached this point of the accident, what did you first notice on the highway?

A. I noticed a car sitting on the left hand side of the road.

Q. Did you see these people before they were struck? A. Yes, I did.

Q. How long before?

A. Just—just about the time we hit them, I guess.

Q. How many were there at the scene that you saw? A. Three.

(Testimony of Robert Monahan.)

Q. And where were they upon the highway?

A. Well, I would say about three or four feet from the yellow line.

Q. Is the yellow line in the center of the highway? A. Yes, sir.

Q. Just prior to this accident how fast—do you know how fast your car was traveling?

A. No, I can't say for sure, no.

Q. Was it going in excess of fifty miles an hour?

A. No.

Q. Did your car leave the pavement and go upon the shoulder at any time?

A. No, sir.

Q. Just prior to that was the direction of your car turned at any time? [198]

A. It swerved before it hit the people.

Q. I beg your pardon, I didn't get your answer.

A. He swerved before he hit the people.

Q. In what direction, to what direction?

A. (Witness points.)

Q. Well, for the record, which way would that be? You are pointing with your hand.

A. It would be to the north.

Mr. Brown: That is all. You may cross examine.

Cross Examination

By Mr. Felton:

Q. Now, you said that you had been returning from The Dalles, did you? A. Yes, sir.

Q. You six people had been down there on a party?

(Testimony of Robert Monahan.)

A. We had been down to The Dalles, yes, sir.

Q. You had been down there to what?

A. I say we had been down to The Dalles.

Q. On a party?

A. Well, if you want to call it that, yes, sir.

Q. Did you people have anything to drink at The Dalles? A. Yes, we did.

Q. All of you? A. Yes. [199]

Q. Were you in a commercial place or some public tavern of that nature?

A. Yes, we went out to a place to eat dinner.

Q. And you went out to dance afterwards?

A. Yes.

Q. And you were——

A. (Interposing): We were in a place where they eat.

Q. And you had been to a dance too?

A. Yes.

Q. And the six of you went across the ferry and went up the highway? A. Yes, sir.

Q. And who was driving?

A. Mr. Wilkerson.

Q. Now, you say you saw these people before they were hit? A. Yes, I did.

Q. And you are quite certain that they were within, I believe you said, three or four feet of the yellow line in the center of the road?

A. Yes, I am.

Q. Now, you are very sure of that?

A. I am very sure.

Q. What was their position?

(Testimony of Robert Monahan.)

A. They were walking three abreast.

Q. There were four people? [200]

A. No, there was three people that I seen was walking three abreast in the road.

Q. And, then, you didn't see them until you got out of his car? A. After we had hit them.

Q. What kind of lights did you have on this car that you were in?

A. What kind of lights?

Q. Yes, what kind of lights?

A. I didn't know what kind of lights they were.

Q. Were you in the front seat?

A. Yes, I was in the front seat.

The Court: A little louder, Mr. Monahan, so the court reporter can hear you.

Mr. Felton: Q. Who was beside you?

A. Mrs. Wilkerson.

Q. Was she awake or asleep? A. Awake.

Q. Was she close to her husband?

A. Well, just as close as you could get three in the front seat.

Q. Did he have his arm around her or did she have her arm around him? A. No.

Q. What was the speed of the car? [201]

A. I couldn't estimate that.

Q. Did you have one or two lights on the road?

A. Two lights.

Q. Did you look at the car before the accident?

A. Yes, I have ridden in the car several times.

Q. I know but I am not interested in what you did in the past; I want to know if you looked at the

(Testimony of Robert Monahan.)

car before the accident to see whether the lights had been burning.

A. You could usually tell if there were one or two lights on there, on the car. There were two lights.

Q. And if the lights were on you could see the road pretty well that night prior to the accident?

A. Yes, sir.

Q. If the weather was clear?

A. Yes, that is right.

Q. How many lights did you see on the car that was up beside the people?

A. One headlight is all I seen. It looked like a spotlight.

Q. And was it turned in your face or to the side of the road? A. Pardon?

Q. Was it turned in your face or to the side of the road? A. I couldn't say to that.

Q. Did it blind you? [202]

A. It did not blind me, no.

Q. Now, this is the top of the hill. Now, how far down was it that that light was upon you?

A. Just as quick as we got over the hill.

Q. As quick as you came over the top of the hill the light came in your face and blinded you?

Mr. Brown: If the Court please, I object to counsel's putting words in the mouth of the witness.

The Court: The objection sustained. He said that the light did not blind him.

Mr. Felton: Q. If the light didn't blind you,

(Testimony of Robert Monahan.)

then, you could see this shoulder of this road down all the way in spite of the other car?

A. Well, I think you could on the road but lights don't shine on the shoulder of the road, they shine out.

Q. Do you disagree with the state patrolman about the correctness of this 272 feet, that this is 272 feet down here?

A. I never measured it.

Q. When did those people first come into your lights then?

A. Well, just as quick as your lights would hit the road as you came over the crest of the hill.

Q. How far over the crest of the hill could you distinguish an object with those lights?

A. I couldn't say as to that. [203]

Q. Could you distinguish it 200 feet?

A. I couldn't—I doubt if you could that far.

Q. Could you distinguish an object 100 feet?

A. Probably could.

Q. And could you that night see objects on the road 100 feet ahead of your car?

A. Maybe not in that spot but you could see.

Q. In other words, you had good headlights?

A. Sure.

Q. And they were adjusted the way you figure?

A. Yes.

Q. And you could see on the road and the road was open and straight? A. Yes, sir.

Q. And the people were perfectly apparent that they were on the roadway, weren't they?

(Testimony of Robert Monahan.)

A. Yes.

Mr. Felton: That is all.

Mr. Brown: That is all.

(Witness excused.)

LORRAINE MONAHAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination [204]

By Mr. Brown:

Q. Mrs. Monahan, were you the wife of the man that was just on the stand?

A. Yes, I was.

Q. And you were in the car that evening?

A. Yes.

Mr. Brown: I am trying to make this very short, your Honor, leading a little bit if it is permissible.

Mr. Felton: I will go along with you except as to the main part.

Mr. Brown: Q. Where were you riding in the car as you approached the scene of the accident?

A. I was in the back seat in the lefthand corner.

Q. I beg your pardon?

A. I was in the lefthand corner in the back seat.

Q. Did you see anybody on the highway?

A. No, I didn't.

(Testimony of Lorraine Monahan.)

Q. Did you feel the impact?

A. Yes, I did.

Q. At the time you felt the impact of the car striking some object or body where was the car on the highway? A. What was that?

Q. When you felt the impact was the car on the pavement? A. Yes, it was.

Q. Was there any time as you approached this point where [205] the car was off the pavement on the shoulder? A. No.

Q. And about where on the pavement was the car when you felt the impact?

A. No, I don't know exactly. I was in the back seat and we were talking and I don't know.

Q. Now, just prior to this accident at any time do you know the rate of speed the car was traveling at? A. No, I don't.

Q. Well, would you have known if it was a high rate of speed?

A. Well, if it had been a high rate of speed it looks like when we stopped that we would have went forward, but we didn't.

Q. You drive an automobile? A. Yes.

Q. And have driven one for how long?

A. Oh, for about ten years.

Q. Now, you all got out of the car after it stopped? A. Yes, we did.

Q. And inquire from these people or went over to these people?

A. Well, we went over to see over where the people were lying.

(Testimony of Lorraine Monahan.)

Q. Did you see an object picked up on the highway? [206] A. No, I didn't .

Q. That night? A. No, I didn't.

Mr. Brown: You may examine.

Cross Examination

By Mr. Felton:

Q. You were in the back seat, weren't you?

A. Yes.

Q. And what was your position in that seat?

A. I was in the lefthand corner.

Q. That was directly behind the driver?

A. Yes.

Q. That puts you down pretty far; you don't see up very far, do you? A. No.

Q. There had been an accident to the right fender of this car sometime before, had there?

A. Yes.

Q. And it had effected the headlight?

A. Well, I can't swear to that.

Mr. Felton: That is all.

The Court: Just a moment. Any further questions?

Mr. Brown: No, that is all, your Honor.

(Witness excused.) [207]

R. C. CHITTESTER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Mr. Chittester, what is your occupation?

A. Locomotive fireman.

Q. For the S. P. & S.?

A. S. P. & S. Railroad.

Q. And you were with this group the night of the accident, were you? A. Yes, I was.

Q. Mr. Chittester, something has been said about drinking. What time did you people leave Wishram that evening?

A. Oh, I would say we left Wishram about eight o'clock, p.m.

Q. And where did you go?

A. To The Dalles, Oregon.

Q. And where did you go; did you go to a dance?

A. We were some time at the Highway Club and some time at the Hanley Club.

Q. What did you do?

A. Had some drinks and supper.

Q. Did you have your supper there? [208]

A. Yes, sir.

Q. Did you dance? A. Yes.

Q. And did you have anything to drink after supper before you left?

A. Oh, we might have had one drink after supper.

(Testimony of R. C. Chittester.)

Q. What time did you leave there?

A. Well, we left there approximately twelve-forty-five or one o'clock.

Q. Approaching the scene of the accident, where were you sitting in the car?

A. What is that?

Q. Where were you in the car?

A. On the righthand side in the back seat.

Q. In the back seat? A. Yes.

Q. Just prior to the accident, do you know how fast your car was traveling?

A. Well, I would say that he wasn't traveling over forty miles an hour at that time.

Q. You drive also? A. Yes, sir.

Q. And also you are on a locomotive?

A. Yes, sir.

Q. Now, did you see anybody on the highway as you [209] approached the scene of the accident?

A. Well, no.

Q. When were you first conscious that it struck somebody; or did you see the people before they were struck? A. No, I didn't.

Q. Now, was the car prior to that time at any time off of the highway? A. No.

Q. Or on the shoulder? A. No.

Q. Did you notice the car change its direction at any time just prior to the accident?

A. Just before the point of impact it swayed to the left, it swerved to the left.

Q. You felt the impact? A. Oh, yes.

Q. And did you measure the distance?

(Testimony of R. C. Chittester.)

A. Well, I didn't measure with a tape.

Q. And how far from the point of impact did it go to where the car stopped?

A. I would say that it swerved directly across the road and north and it was from thirty-five to forty feet from where the point of impact to where it stopped.

Q. Now, did you pick up any object or see any object on the road that night? [210]

A. Yes, I did.

Q. What did you see after the accident?

A. I picked up a brown moccasin type shoe, a woman's shoe.

Q. And where was that on the highway?

A. It was lying on the center line of the highway.

Q. Was there anything else on the pavement or road?

A. Yes.

Q. What was that?

A. A red hunter's hat.

Q. What is that?

A. Red hat that men wear.

Q. Red hunter's hat? A. Yes, sir.

Q. Now, where was that hat?

A. The hat was behind—well, it would be up behind the point of impact, evidently as though somebody had lot it in the road.

A. What did you do with the shoe?

A. I took the shoe and brought it over to where Mrs. Corbett was lying in the ditch and put it down alongside of her.

(Testimony of R. C. Chittester.)

A. Did you see a soldier there that night?

A. I did.

Q. How many soldiers were there? [211]

A. Well, they say that there was two soldiers there. I only talked to one.

Q. Was that the young man who has been on the stand, Mr. Merrill?

A. Yes, it was Mr. Merrill.

Q. Did you hear him talking to the defendant?

A. I did.

Q. Who else was there when you talked?

A. Mr. Monahan was there and—and Miss Wilson when we were trying to get Mr. Merrill's name.

Q. And did Mr. Merrill give you his name?

A. Well, he didn't want to at first but he did.

Q. Did Miss Wilson participate in that conversation with the soldier? A. She did.

Q. Now, another car came along almost immediately after the accident?

A. Yes, several cars and trucks.

Q. Well, one of them proceeded right on to call an ambulance, is that right? A. He did.

Q. And you remained right there until after the officers arrived?

A. Yes, I was there until everybody had gone and the last car had left. [212]

Mr. Brown: That is all. You may examine.

Cross Examination

By Mr. Felton:

Q. Did you give Mr. Merrill's name to the officers when they came down?

(Testimony of R. C. Chittester.)

A. No, I didn't. Mr. Wilkerson did.

Q. He gave Mr. Merrill's name to which officer?

A. Well, I don't know. He had his name there but to which officer he gave it to I don't know.

Q. He gave it one of them, though?

A. I was under the impression that he did.

Q. And you could see down the road when you were looking out of that car that night, couldn't you?

A. Oh, I could see for a short distance, yes.

Q. The lights were ordinary good lights and you could see if you looked?

A. If I raised up over the front seat I could see all right.

Q. If you had raised up over the front seat you could see down the road clearly? A. Yes.

Q. What kept you from seeing?

A. Oh, I had nothing to watch out for.

Q. But you could see when you looked, couldn't you? A. Yes, sure. [213]

Q. And it was an ordinary dry clear night?

A. It was a dry clear night.

Q. And the windshield wasn't obscured?

A. No.

Q. And the windshield was clean, was it?

A. Ordinarily clean as you can keep them. It had—

Q. Ordinarily nothing to keep you from seeing if you looked, is what I am asking you.

A. Yes.

Mr. Brown: He has answered that question.

(Testimony of R. C. Chittester.)

Mr. Felton: Q. You say that the car swerved to the left? A. Yes.

Q. Before striking these people? A. Yes.

Q. And you did not see the people before they were hit? A. No, I didn't.

Mr. Felton: That is all.

Redirect Examination

By Mr. Brown:

Q. Did you say that the car swerved or turned; I don't know what you said?

A. Well, it was like a car applying the brakes to make a sudden left turn and you came around and could feel it.

Mr. Brown: That is all. [214]

Mr. Felton: Just one more question.

Recross Examination

By Mr. Felton:

Q. Did any of the officers ask you any questions?

A. No, they didn't.

Q. Nobody that night asked you any questions at all?

A. Oh, they asked me what car I was with, what party.

Q. Which one of the officers asked you questions?

A. I think it was Mr. Woodward.

Q. Mr. Woodward, the Sheriff?

A. Yes, sir.

Q. And that was the time they told Mr. Merrill's name?

(Testimony of R. C. Chittester.)

A. I can't say whether that was the time or not.

Q. You were there when Mr. Wilkerson got Mr. Merrill's name, weren't you? A. Yes.

Q. And he got his name and full address?

A. He got his name but as to his address I don't know.

Q. Yes, I know but he got sufficient information to communicate with him?

A. I imagine he did.

Q. And that was passed on to the officers?

A. I can't swear whether that was passed on to the officers or not.

Mr. Felton: All right, that is all. [215]

Redirect Examination

By Mr. Brown:

Q. Do you know whether Wilkerson told the officers Merrill's name?

A. No, I don't.

Q. To refresh your recollection, didn't you hear a conversation between Merrill and Wilkerson when Wilkerson finally got the name and Merrill said not to tell the officers his name?

A. Well, he didn't want to tell them because he was on "French leave" and didn't want to go back to the base.

Mr. Brown: That is all.

Mr. Felton: That is all.

(Witness excused.)

MARGARET CHITTESTER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination

By Mr. Brown:

Q. Your husband was just on the stand?

A. That is right.

Q. Now, where were you riding in this car that night?

A. In the middle of the back seat.

Q. Now, as you approached the scene of the accident, [216] did you see anybody in the highway then? A. No, I did not.

Q. When were you first conscious of the fact that the car struck something?

A. Oh, when I felt it.

Q. When you felt it? A. Yes.

Q. Now, where on the highway was the car when you felt it hit something?

A. I couldn't say exactly where it was.

Q. Well, was it on the pavement?

A. Yes.

Q. Heading off the pavement at that time?

A. Not to my knowledge.

Q. Well, if it had been off, would you have known? A. I think I would have.

Q. Was it on the shoulder just prior to the accident? A. No.

Q. Or was it on the shoulder at the time of the accident? A. No.

(Testimony of Margaret Chittester.)

Q. And how far after you felt this impact did the car go before it stopped?

A. Well, as to the distance I can't say but it seemed like a very short distance.

Mr. Brown: Now, you may examine. [217]

Cross examination

By Mr. Felton:

Q. When you raised up and looked out of that car you could see ahead, couldn't you?

A. Yes.

Mr. Felton: That is all.

Mr. Brown: That is all.

(Witness excused.)

The Court: The Court will recess for five minutes.

JOHN C. WILKERSON,

the defendant here, called and sworn as a witness on his own behalf, testified as follows:

Direct Examination

By Mr. Brown:

Q. You are the defendant in this case?

A. Yes.

Q. And what is your occupation?

A. Brakeman on the S. P. & S. Railway.

Mr. Felton: I didn't get this man's name.

Mr Brown: He is the defendant.

(Testimony of John C. Wilkerson.)

The Court: Mr. Wilkerson.

Mr. Felton: Pardon me, yes, Mr. Wilkerson.

Mr. Brown: (Q.) Mr. Wilkerson, you own the car that you had been driving that evening? [218]

A. Yes, I do.

Q. Where had you been that evening?

A. To The Dalles.

Q. And what had you done at The Dalles?

A. We had been out to a little restaurant and dance hall, and we had supper and danced.

Q. And what time did you leave The Dalles?

A. Well, I don't know exactly but we were at the ferry there a little after twelve, but it was somewhere in the neighborhood of twelve-thirty or something like that.

Q. Now, approaching the scene of the accident, as you came over the brow of the hill what did you see?

A. Well, I seen a bright light and it was bright, rather bright at the time and I made some remark about it being bright.

Q. Now, what, if anything, did you do with reference to the car, did you slow down?

A. Well, I imagine that I did, but as far as recalling that I did——

Q. By the way, as you came over the brow of the hill, were you on a down grade from then on?

A. Yes.

Q. When you first saw any pedestrians on the highway about how far back were you?

(Testimony of John C. Wilkerson.)

A. Well, I couldn't see anything until I passed this care. [219]

Q. That was parked there?

A. Yes. And just shortly after that—just shortly after that I seen——

Q. What did you see in the highway; how many people?

A. Well, there was three people standing there and it looked like they were moving towards me but as to that, I can't say.

Q. How close together?

A. Well, they were rather close but my impression was that they were either carrying or supporting or holding someone.

Q. What did you do when you saw them?

A. Well, I just turned my car to the left and applied brakes immediately.

Q. And what part of your car struck them?

A. Oh, it was more of the left front side of the fender, or the right front fender, the side of the right front fender.

Q. Now, I hand you Identification 2 and ask you when that was taken.

A. That was taken—Oh, I don't remember the exact date but it was taken after the accident.

Q. What change, if any, was made between the time of the accident and the time of the taking of these pictures?

A. I replaced the bulb and the lense on the right headlight. [220]

Q. Other than the change in the headlight is

(Testimony of John C. Wilkerson.)

that a fair representation of your car, the damaged portion of your car after, immediately after the accident? A. Yes, it is.

Mr. Brown: I offer it in evidence, if your Honor please.

The Court: Show it to counsel.

The Clerk: Defendant's Identification 2.

Mr. Felton: May I ask one question.

Mr. Brown: Oh, yes.

The Court: Yes.

Mr. Felton: (Q.) Does this show the mark on the cowl?

A. Yes, it does, it is there.

Q. Will you point it out to me?

A. (Witness shows to counsel.)

Mr. Felton: I have no objection to the photograph.

The Court: It will be admitted in evidence.

Whereupon, photograph previously marked for identification, received in evidence as Defendant's Exhibit 2.

Whereupon, a photograph marked Defendant's Identification No. 3.

Mr. Felton: If you have any other pictures there that will show a fair representation, I have no objection to them.

The Court: Let me see that one. Mark those first. (Q.) The headlight is in the fender on your car, Mr. Wilkerson? [221]

A. Yes, it is.

(Testimony of John C. Wilkerson.)

Mr. Brown: (Q.) Now, I hand you Defendant's Identification 3, will you tell us what that is.

A. Yes, it is.

Q. Is that a picture of the car?

A. Yes, it is.

Q. Taken at the same time as Defendant's Exhibit 2? A. Yes.

Q. Simply from a different angle?

A. That is all.

Q. And other than the change in the headlight that you testified to, is that a fair representation from that angle of your car immediately after the accident? A. Yes.

Q. What is your answer? A. Yes.

Mr. Brown: I will offer this in evidence.

Mr. Felton: When you offer it I want to ask a couple of questions.

Mr. Brown: I am offering it.

Mr. Felton: I believe I can bring it out on cross examination later. I think I can bring it out on cross examination.

The Court: You are objecting to this because it is not sufficiently identified? [222]

Mr. Felton: Yes.

The Court: It will be admitted.

Whereupon, photograph previously marked for identification, was received in evidence as Defendant's Exhibit 3.

Mr. Brown: (Q.) Now, in Defendant's Exhibit 2, were there any of those dents in the fender prior to the accident that night?

(Testimony of John C. Wilkerson.)

A. No, it really isn't a dent. The accident that they were speaking of before, I merely scratched a fence post on the highway, on the side of the highway when I was pried to the post and pulled away from it.

Q. How long before the accident was it?

A. At least a month before the accident.

Q. And so the indentations shown in these pictures were the results of the accident on September 9th?

A. Yes, they were.

Q. Now, how far did your car go after striking these people before it came to a rest?

A. Well, it was a very short distance, around anywhere between twenty and thirty feet, I would say.

Q. Now, just prior to the accident how fast had you been driving?

A. Oh, I imagine around forty, maybe forty-five miles an hour. [223]

Q. Were you off of the paved portion of the highway at any time?

A. No, I wasn't.

Q. You say that you turned to the north just prior to the accident?

A. When I seen the people I turned to the north.

Q. Now, you had driven this road before?

A. Oh, yes, a number of times.

Q. And were familiar with it? A. Yes.

Q. And had in mind the width of the shoulder on each side?

(Testimony of John C. Wilkerson.)

A. Well, there is a ditch and rocks and everything out to the righthand side.

Q. Now, after the accident what did you do? Just go ahead and tell the Court just exactly what you did.

A. Well, I got out of the car and I seen these people in the ditch and I looked at this one fellow and came to the conclusion that he was dead, and I seen the other lady but there was nothing I could do for her at the time.

Q. Did another car come along about the same time?

A. Yes, there was a car when I turned—I cut across the road in front of him when I stopped.

Q. And where did he go?

A. I asked him to call the ambulance and the state patrol if he could, and he left. [224]

Q. And you waited at the scene of the accident; you stayed there? A. Yes, I did.

Q. Now, did you have any conversation with this plaintiff Titus Corbett?

A. Well, there was some conversation there but I don't know just exactly what it was at this time.

Q. At the scene of the accident there were a couple of soldiers? A. Yes, sir.

Q. And was one of them Mr. Merrill, who was in here? A. Yes, Mr. Merrill.

Q. Did you have any conversation with him?

A. Yes, I did.

Q. And who else was there when you talked to him?

(Testimony of John C. Wilkerson.)

A. Well, my wife was there, Miss Wilson, was there, and well the rest of them was around close and there was another soldier there.

Q. And was Miss Wilson where she could hear your conversation? A. Yes, she was.

Q. Did she participate in the conversation?

A. Well, yes, she entered into it.

Q. With the soldier? A. Yes. [225]

Q. Now, there was something that was said about the difficulty of getting his name. Now, just tell the Court what happened there?

Mr. Felton: If the Court please, I ask that the witness be admonished not to give conversations.

Mr. Brown: (Q.) Did you have any trouble getting his name for a minute?

A. Yes, at first he didn't want to let me have it.

Q. And did you later give his name to the police officers?

A. No, I don't recall as I did. I don't know whether he got them or not. I had them on the little pad there and I don't recall whether I gave the pad to him or not.

Q. How long did you remain around the scene of the accident there?

A. Oh, I was there until after the ambulance had left for The Dalles.

Q. And all the parties that were involved were gone when you left?

A. Yes, I believe they were.

Q. And the officers also left?

A. No, the officers were there.

(Testimony of John C. Wilkerson.)

Q. Oh, which officers remained there?

A. Mr. Hyland and Mr. Woodward.

Q. Then you left? [226] A. Yes.

Mr. Brown: You may examine.

Cross Examination

By Mr. Felton:

Q. Well, now, the lights of your car were in perfectly good working order that night, were they?

A. Yes, they were.

Q. And they were adjusted so that you could see the ordinary 150 feet or 200 feet down the highway, were they? A. Yes.

Q. And you were able by such lights to distinguish an object 100 or 200 feet down the highway?

A. I would ordinarily see it, yes.

Q. Where the road was clear and straight?

A. Yes.

Q. And you noticed the lights of which vehicle, now, the one parked on the top of the hill or the one that somebody has testified to as being halfway down the hill from the point of the impact?

Mr. Brown: I object to the testimony on this because there is a serious question whether there was some other car parked there.

The Court: I will sustain the objection as to the form of the question.

Mr. Felton: All right, I will reframe the question. (Q.) [227] When you topped the hill what did you first see? A. A light.

(Testimony of John C. Wilkerson.)

Q. One light or two or what?

A. I was under the impression that it was one light.

Q. Was it from a car or could you tell?

A. Well, it was from a car or some vehicle. It was a headlight.

Q. Did it blind you, or didn't it?

A. It did blind me.

Q. And could you see the road when that light blinded you?

A. I could see on the shoulder of the road.

Q. But you couldn't see the middle of the road while that light was blinding you?

A. Well, I could see for a short ways, not a normal distance.

Q. How far?

A. Well, it was just a short distance past the car.

Q. I mean, was it ten or twelve feet?

A. Yes, something like that.

Q. And, then, the major portion of the road was blotted out by this light that you saw?

A. Well, the road ahead of me was after a certain distance.

Q. And how long did that blinding continue? [228]

A. Well, it was just after I passed the car with the light on that I saw the people in the road, which would be a very short distance?

Q. How close to these people were you before the blinding ceased?

(Testimony of John C. Wilkerson.)

A. Oh, I imagine in the neighborhood of—oh, anywhere between thirty and forty feet, I imagine.

Q. And you saw these people thirty or forty feet before you hit them?

A. Something like that.

Q. But before that you were totally blind as to any objects where they were?

A. No, not totally blind, no.

Q. Well, could you have seen them before if you had looked?

A. I might have been able to see them had they been off of the road, because in driving a car, as you know, you can see the side of the road. Even if the lights are blinding right here (illustrating) you can still have a view to your right.

Q. You were blinded by the light as to a portion of the road? A. Yes, partly.

Q. And did you continue to drive at high speed while you were blind? [229]

A. No, sir, I wasn't at high speed at any time.

Q. What speed were you making?

A. Thirty-five or forty miles.

Q. Well, you continued to drive that while you were blinded?

A. No, I don't think I did.

Q. What speed were you making during the time you were blinded or after you were blinded?

A. Well, I wasn't looking at my speedometer at that time.

Q. Approximately what speed?

A. Well, less than I had been normally going.

(Testimony of John C. Wilkerson.)

Q. Did you reduce your speed five miles an hour? A. I imagine I did.

Q. Did you reduce it ten miles?

A. I can't say as to that.

Q. It was probably somewhere between five and ten miles an hour? A. I imagine.

Q. And then you were driving somewhere between thirty-five and forty miles an hour while you were blinded by this one light on another vehicle, is that true?

A. I imagine I was going at that speed but I wasn't entirely blinded by that light.

Q. Well, then, could you see the highway? [230]

A. I could see a portion of the highway.

Q. But you were blind as to a major portion of the highway, were you not?

A. Well, I want to state that I could see a small part of the highway at that time.

Q. You could see the portion of the highway that you were traveling on for how far ahead, then?

A. Well, that is hard to say.

Q. Well, you give your best estimate.

A. Well, I can't say but after you pass a car——

Q. I don't want generalities.

A. You can see for a certain way after the lights are gone, that blindness doesn't last for two or three minutes or anything like that.

Q. I don't want generalities, I want to know what you did that night. How far could you see in the path of your own vehicle while the light was in your vision.

(Testimony of John C. Wilkerson.)

A. I can't make any statement on that.

Q. But you could see for a considerable distance?

A. I could see a ways.

Q. And did you later discern what this light was one?

A. No, I wasn't interested in that at that time.

Q. Later?

A. No, I had no way of telling later.

Q. Did you tell later after you investigated the matter? [231]

A. No, I never did investigate as to which car the light was on.

Q. In your opinion, it was some light or it was a spotlight, or did I take that from some other witness?

A. It was my impression that it was either a car light or a spotlight. I had no way of telling because when you pass a car you cannot see.

Q. Did the light appear to be moving?

A. No, I cannot say whether the light was moving or not.

Q. But then you topped the top of the hill and you passed the car and your vision was open as to the part of the highway you were driving on, is that right?

A. Yes, part of it was open.

Q. And the blinding was only as to the part of the highway you were not driving on, is that right?

A. I can't see your question.

(Testimony of John C. Wilkerson.)

Q. I don't want you to see the purpose of it; I want you to see an answer of it as to the fact.

Mr. Brown: I was going to object, your Honor, before but I object to the question because it is again putting in the witness' mouth something he didn't testify to. What he testified to was he could see the shoulder of the highway.

The Court: What was the question.

(Last question read.) [232]

A. I don't know what there was, or know what highway you mean I was driving on. I can't understand what part to answer.

Mr. Felton: (Q.) All right, could you see the part of the highway you were driving on?

A. Yes, a portion.

Q. What portion? If you will answer my question we will be through on this.

A. Away on the shoulder of the highway.

Q. And how far could you see?

A. I can't make no estimate of that part.

Q. Now, what part of the highway were you driving on?

A. Well, I was in what would be the south lane of the highway.

Q. Were you close to the yellow line or to the shoulder?

A. Well, I would say I was driving approximately in the center of the lane.

Q. Now, that is the black top part?

A. Yes.

Q. And that would be the center of the lane?

(Testimony of John C. Wilkerson.)

A. Yes.

Q. Do you know the width of your car?

A. No, I don't know.

Q. It was approximately five feet?

A. I can't tell you. [233]

Q. And that lane is approximately nine and three-quarters feet wide? A. I can't say.

Q. Do you know how wide the shoulder is?

A. No, I never made no measurement of that either.

Q. You heard the state patrolman testify?

A. Yes.

Q. Do you have any reason to disput his testimony in any manner?

A. No, I can't say as to that.

Q. The road that you could see was the road directly in front of the right side of your car?

A. Well, I can't tell you. When I passed the car at the meeting point of the car I could see for a few feet and after you got by the car my eyes came back to normal and I could see for a ways.

Q. Where did you pass this car in reference to the top of the hill?

A. Well, it was—there was more than one car there and in passing cars I never make—pay too much attention to the cars when passing them on the side of the road.

Q. Your car killed a man that night. Did you pay any attention to the car that night.

Mr. Brown: If the Court please, I object to that question. [234]

(Testimony of John C. Wilkerson.)

The Court: Objection sustained.

Mr. Felton: I didn't mean anything except to call attention to the seriousness of the occasion.

Mr. Brown: Well, he has been perfectly serious about it.

Mr. Felton: Q. Didn't you pay attention that night or didn't you think of the matter after the accident?

A. Certainly, I gave the matter quite a little bit of thought after the accident.

Q. You had been drinking quite a bit at the dance? A. We had quite a few drinks.

Q. What did you do after this light cleared in your vision?

A. I eased up on the accelerator.

Q. You did not put on the brakes?

A. No, I had no reason to put on the brakes.

Q. You did not turn off the ignition but you eased up on the accelerator?

A. That is right.

Q. Did you totally ease up on the accelerator or part way?

A. I eased up all the way as far as I know.

Q. Did you tell the officers, specifically the state patrolman Hyland, that night that you did not see the people until you hit them?

A. No, I did not.

Q. That statement, then, is not true? [235]

A. No, sir. I seen the people and turned and applied brakes before I hit the people so I must have

(Testimony of John C. Wilkerson.)

seen them. Otherwise, I would have had no reason to turn the car had I not seen them.

Q. Why didn't you turn the car to the right and go around these people?

A. Because there is a ditch in there and a lot of rocks and the left lane of the highway was open.

Q. Then, you meant to get clear across in front of them and get into the other lane?

A. Yes, I had as much chance as going to the right.

Q. Now, there was enough room to the right of them to get by?

A. Well, there could have been.

Q. If you had gone around?

A. Yes, but I am not in the habit of driving off the highway.

Q. Even if you had seen people on the highway?

A. If there had been an object on the lefthand side of the highway I would have gone around, or an obstruction there.

Q. Could you have gone around them? Around the right side?

A. Well, I would say that they were just as close to the yellow line as they were to the edge of the black top.

Q. But there was room enough to go around the right?

A. I couldn't say as to that. [236]

Q. How far over to the yellow line would you have to go to pass them on the left?

A. With the right side of my car?

(Testimony of John C. Wilkerson.)

Q. Yes.

A. I would have just to clear the yellow line to have sufficient distance.

Q. Now, who took these pictures?

A. The Elite Studio, at the Elite Studio at The Dalles.

Q. When were they taken?

A. If I can recall it was in March.

Q. When? A. It was in March.

Q. And you say nothing had been done to your car except that the headlight had been replaced?

A. No, sir, nothing.

Q. And had that been ironed out at all?

A. No.

Q. There was no change from the time of the accident until these pictures were taken except that the bulb and lense in the headlight had been replaced, is that true?

A. At the scene of the accident we pulled the fender back just enough to clear the tire, and outside of that, that is all.

Q. All right, you did pull the fender back some?

A. Just a little, just a small matter is all, not over [237] an inch.

Q. But you didn't pull out any bumps or anything of that nature? A. No, sir.

Q. There had been a former accident on this fender, hadn't there?

A. No, sir. it wasn't an accident.

Q. The fender had been welded up?

(Testimony of John C. Wilkerson.)

A. Merely scratched the paint on the post of the highway.

Q. You say that there was a mark on the cowl that got there that night? A. Yes, sir.

Q. This is Defendant's Exhibit 3. Will you point out to His Honor where that is.

A. It is right there (showing to the Court).

The Court: Will you put an "X" there, please.

A. A cross.

The Court: The witness is marking an "X" on Defendant's Exhibit 3 to show the place.

Mr. Felton: And will you also do the same thing to Defendant's Exhibit 2. The defendant here is also marking an "X" on Exhibit 2.

Q. You say that a commercial photographer took those pictures? A. Yes, sir. [238]

Q. You don't know what kind of camera he used?

A. No, sir, I wouldn't have any way of knowing.

Q. Do you know what lense opening he used?

A. No.

Q. You never had access to the films?

A. No. But I have the car.

Q. Do you know where the films are?

A. No, sir.

Q. Do you know whether the films are retouched or not? A. No, sir.

Q. Do you know the type of film or size of development or size of film that those pictures came from?

A. No, sir, I am not familiar with photography.

(Testimony of John C. Wilkerson.)

Q. You were not there when they were printed?

A. No, sir.

Q. You don't know what happened at the time they were developed do you? A. No.

Q. In other words, all you know is that the pictures came from the photographer, is that correct?

A. I know that the car is my car and I know that I had those pictures taken.

Q. How were your brakes on that car?

A. I know that they were in good condition.

Q. How quickly could you stop the car traveling at [239] thirty-five miles an hour?

A. I don't know. There would be only one way to find out and that would be to try.

Q. Well, you know that sixty-three feet of skid-marks represent the time it would take, wouldn't it?

A. Well, it is possible, yes.

Q. No, you said you swerved the car before you hit the people?

Mr. Brown: If the Court please, I object to counsel putting words in the witnesses' mouth.

The Court: Objection sustained.

A. I didn't say I swerved the car. I turned the car. I just turned the wheel and the car swerved.

Mr. Felton: I didn't mean to express it incorrectly. The terms are interchangeable. We use them interchangeably and probably that was wrong.

Q. But you turned the car, and how far did you go before you hit these people?

A. I never did measure the distance.

Q. How many feet up the highway?

(Testimony of John C. Wilkerson.)

A. I never measured it.

Q. You have no estimate at all?

A. I imagine that I swerved there somewhere in the neighborhood of, oh, I don't know, I can't say exactly or anything. It seems like fifteen or twenty feet, more or less.

Q. And did you put on your brakes at the same time? [240] A. Yes, sir.

Q. And, then, fifteen or twenty feet of these skidmarks represent a time before you hit the people?

A. Yes, sir, there were skidmarks before I hit the people.

Q. Fifteen or twenty feet of them and the other sixty-two or sixty-three feet, whatever it was, was after you hit the people?

A. I never measured it.

Q. Do you understand this diagram well enough to remember your angle across the road after the skidmarks?

A. I know that the angle is a little bit off with reference to the skidmarks.

Q. Well, I know, but the angle across is approximately correct?

A. Well, I don't know what the angle is.

Q. Well, your estimate is that it was a greater or lesser angle than this?

A. Well, it was an angle similar to this thing. I think it was shorter.

Q. You think it was harder across the highway?

A. Yes.

(Testimony of John C. Wilkerson.)

Q. It was in a more abrupt angle?

A. I couldn't say as to that exactly but I am pretty sure that it is.

Q. Then, you traveled a considerable distance north from [241] where you hit the people from where you had been traveling when you saw them?

A. A distance north?

Q. Yes.

A. Yes, I went across the lane of this highway.

Q. Yes?

A. I went across to the left lane of the highway.

Q. And you were into the left lane of the highway before you hit these people?

A. I believe part of my car was at the time. I wasn't paying any attention to where that lane was.

Q. You afterwards made some investigation of the accident, didn't you? A. Yes, I did.

Q. And you took down the names of the witnesses? A. Yes.

Q. And do you have the paper that you used to take them down on? A. I have it.

Q. Do you have it with you?

A. No, I haven't it with me.

Q. Where is it?

A. It is at Wishram, at my home.

Q. Well, you knew you were coming to this trial?

A. I didn't know it at the time, no. [242]

Q. I mean that that is still at your home at Wishram? A. Yes, sir.

(Testimony of John C. Wilkerson.)

Q. But you knew that you were coming up here to testify at the trial?

Mr. Brown: Objected to as wholly immaterial.

Mr. Felton: Yes, I withdraw it if it is objected to. That is all.

Mr. Brown: I think that is all, your Honor.

(Witness excused.)

HELEN WILKERSON

called and sworn as a witness in behalf of the defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. You are the wife of the defendant?

A. Yes.

Q. Where were you riding in the car that evening?

A. I was sitting in the center in the front seat.

Q. Now, as you approached the scene of the accident, do you know how fast the car was traveling?

A. No, I do not. I imagine—I would say about thirty-five or forty.

Q. When you first saw some people on the highway how far back was the car? [243]

A. Well, I don't recall how far back the car was but I saw these three people on the middle of the road and at the same time that I hollered, "There"

(Testimony of Helen Wilkerson.)

people in the road," my husband applied his brakes and turned to the north.

Q. Now, prior to that time had the car been off of the highway, just prior to this, on the shoulder of the road?

A. Had been off of the highway?

Q. Yes? A. No.

Q. Was it on the shoulder or over the shoulder at any time? A. No.

Q. After the accident you got out of the car?

A. Yes, sir.

Q. And you husband talked to these people?

A. Yes.

Q. Now, how far did your car go after you struck the people, do you think, or would you say?

A. Well, I don't know how far it went.

Q. As a matter of fact, you were greatly shocked by the accident, weren't you? A. Yes.

Mr. Brown: You may examine.

Cross Examination

By Mr. Felton: [244]

Q. You say you were in the middle of the front seat when this thing happened? A. Yes.

Q. It was pretty hard for you to see over this cowl in there? A. Is it what?

Q. It was pretty hard for you to see over that cowl in the middle of the front seat, wasn't it?

A. Well, not too hard.

Q. Were you watching the road or were you asleep at that time?

(Testimony of Helen Wilkerson.)

A. I was watching the road.

Q. Did you see these people just before they were hit?

A. Well, I saw them just before my husband turned the wheel.

Q. You heard him testify that he turned it just as far as he could? A. What?

Q. Turned to the left as far as he could?

Mr. Brown: That is objected to, if your Honor please.

The Court: Objection overruled.

Mr. Felton: Q. You heard your husband testify as to turning the car? A. Turning the car?

Q. Yes. [245] A. Yes.

Q. You heard him testify that he turned it at a sharp angle to the left, did you not?

A. Well, I can't say whether he said a sharp angle.

Q. Well, now, he turned to the left at a sharp angle?

A. Yes, he turned to the left at an angle.

Q. And at the same time he put on his brakes and fifteen or twenty feet later he hit these people?

A. Well, I can't say as to how many feet.

Q. Well, now, you saw these people on the highway before they were hit. How were they proceeding?

A. They were walking three abreast on the highway.

Q. Walking how; three abreast?

(Testimony of Helen Wilkerson.)

A. They were walking this way across the highway (illustrating).

Q. Arm in arm or how?

A. Well, they were close together.

Q. How close together?

A. Well, I can't say.

Q. Were they all standing up?

A. I think so.

Q. And who was on the road, that is the part of the highway, that would be the lefthand part of the highway where you were going, which one of the persons was on the road?

A. Which one of what? [246]

Q. Of these Indians were on the road?

A. I can't say to that.

Q. And which one was next to which one?

A. I don't know.

Q. Where was Mrs. Corbett; where was she standing?

A. I don't know.

Q. You saw her, didn't you?

A. Yes, but they were all wearing slacks, as I remember, that night and they all looked like men to me and I couldn't tell one from the other.

Q. And they were all standing and walking together?

A. Yes, they were.

Q. And they were walking close together and solidly, were they?

A. What?

Q. Solidly together?

A. I—Oh, I wouldn't say.

Q. Well, were they strung out in a line or which?

A. Yes, I would say they were.

(Testimony of Helen Wilkerson.)

Q. And all standing up? A. Yes, sir.

Q. And which way were they walking?

A. Which way were they walking?

Q. Yes, which direction?

A. Towards us. [247]

Q. And where in the highway?

A. I would say in the middle of the highway.

Q. On the yellow line?

A. In the middle of the line, I should say, in which we were driving.

Q. In the middle of the right hand lane of the highway? A. Yes, sir.

Q. And where was your car proceeding; in the middle of that lane? A. I would say so.

Q. Was anyone of them ahead of anyone?

A. What do you mean; I don't understand your question.

Q. Well, was one closer to you than the other or were they strung at right angles across the highway? I am trying to get their position one way or another.

A. They were walking all three together.

Q. Four wasn't it?

A. I couldn't see the fourth one.

Q. You saw three people walking together?

A. Yes, sir.

Q. And all apparently even together and just walking up the highway? A. Yes.

Q. And you didn't see the fourth one?

A. I don't know where the fourth one was, I couldn't [248] see a fourth one.

(Testimony of Helen Wilkerson.)

Q. But you could see the road with your headlights?

A. We could see the road with our headlights?

Q. Yes.

A. Yes, before we came to this bright light.

Q. And what happened when you came to the bright light?

A. I couldn't see anything.

Q. You couldn't see anything?

A. No, I couldn't see anything.

Q. For how long a time?

A. Until we passed it.

Q. And how soon after you seemed to be blinded did you hit these people?

A. As to that I can't say.

Q. How many feet, would you say?

A. I couldn't say.

Q. Was it before or after your husband swerved the car that you ceased to be blinded?

A. I couldn't say.

Q. Was it before that that you ceased to be blinded? A. I don't know.

Q. Your best estimate. You know that you were suddenly blind and you swerved your car and you hit them and the accident happened, is that it?

A. Well, I know that I was blinded by the lights of [249] the car and I saw these people and at the same time my husband applied brakes and turned to the north.

Q. And you heard your husband testify that he

(Testimony of Helen Wilkerson.)

saw them fifteen or twenty feet before he hit them, didn't you? A. Yes.

Q. And that was the time that you ceased to be blinded, was it? A. It must have been.

Q. And up to that time you couldn't see the road at all. A. (Nodding head.)

The Court: Answer so that the reporter can hear you. He can't see you shake your head.

Mr. Felton: Pardon me, I should have noticed that.

Q. Your husband slacked speed as you came up over the hill, by easing up on the accelerator?

A. Yes.

Q. And at the time he let up on the accelerator he was going down grade? A. Yes.

Q. Quite a down grade in the highway?

A. I don't know anything about down grades.

Q. Did you notice the speedometer at any time, say, a half mile before the accident that night to see what speed he was driving.

A. I don't know that I did. [250]

Q. What was his usual ordinary speed on the highway?

A. It was around forty to forty-five.

Q. And that is what he was driving that night?

A. Yes.

Mr. Felton: I think that is all.

Mr. Brown: That is all.

(Witness excused.)

Mr. Brown: If the Court please, I don't really see why this question of the release of the body

was brought into the case. I don't think it is material. I have the release of the body but I don't think it is material whether the coroner signed the death certificate.

The Court: I don't see its materiality, no.

Mr. Felton: What was this? I didn't hear, your Honor, I am sorry.

The Court: Mr. Brown has raised the question here as to whether or not this body was released by the coroner or by somebody else. I can't see the materiality at all.

Mr. Brown: I raised the question.

Mr. Felton: I don't think it is material.

Mr. Brown: In that case, I rest.

The Court: Do you have any rebuttal?

Mr. Brown: Oh, your Honor, on the matter of the speed law I have a witness to testify as to the date that the Supervisor of Highways issued the fifty mile an hour limit. [251] Would you care to have him show that. It is a matter of the proclamation of law. But he is here.

The Court: Would counsel be willing to stipulate as to the date it was restored?

Mr. Felton: Well, I could stipulate if I knew. I know it came after "VJ" day.

The Court: You could make a stipulation but if you desire to make formal proof, you may.

GORDON E. HYLAND

recalled as a witness on behalf of defendant, testified as follows:

Direct Examination

By Mr. Brown:

Q. Did you check to determine the date when the proclamation limiting the speed to thirty-five miles an hour was revoked?

Mr. Felton: I object to that, if the Court please, as not the best evidence.

The Court: I am going to permit the witness to answer. It is a matter of which the Court can take judicial notice.

Mr. Felton: If the Court takes judicial notice on it, this is merely for the Court.

The Court: If the witness has the date on it, it will save me the trouble of looking it up. [252]

The Witness: I received notice from the chief of my department that the Director of Highways had released the speed limit from thirty-five miles an hour on August 25, 1945.

Mr. Brown: Q. That was directly after the Japs surrendered?

A. I believe it was right after gas rationing. It was August 25, 1945.

Mr. Brown: That is all, we rest.

The Court: The other witnesses may be excused, and Court will recess until one-thirty.

Afternoon Session, May 9, 1946, 1:30 o'clock, p.m.

Mr. Felton: You have rested?

Mr. Brown: Yes, we rested.

Mr. Felton: I think we have one witness on rebuttal, your Honor, and then the argument.

The Court: All right.

TITUS CORBETT

recalled as a witness on behalf of plaintiffs, testified as follows:

Direct Examination

By Mr. Felton:

Q. Mr. Corbett, you heard the police officer testify as to the condition of the shoulder between where you and [253] your wife were in the ditch and where the ambulance stopped and loaded her, didn't you? A. Yes, sir.

Q. And were there any people walking on that shoulder between that time of the accident and the time that the officers came?

A. Yes, there was.

Q. And to what extent did people walk on that shoulder?

A. Well, people came back down the road looking at this body and also looking down in the ditch where my wife was staying and they were all using this shoulder walking around and milling around.

Q. To what number?

A. Well, I would say that at least fifteen or twenty people passed on the shoulder. And also we loaded my wife over the shoulder.

(Testimony of Titus Corbett.)

Q. And how many people did it take to load your wife over the shoulder?

A. Oh, probably three or four.

Mr. Felton: That is all.

Mr. Brown: No examination.

(Witness excused.)

Mr. Felton: The plaintiffs now rest.

(Whereupon, after completion of argument of counsel, the Court gave the following oral opinion:) [254]

OPINION OF THE COURT

The Court: The submission of a case of this kind to the Court without a jury places a heavier responsibility upon the Court than he would otherwise carry, obviously, because he must pass not only upon the facts of the case but the law as well; and as in this case as well as every case involving an automobile accident, it is necessary for the trier of the facts to pass upon direct conflict in the testimony and the evidence and determine the credibility of the witnesses.

This is no an unusual situation. There are nearly always two versions of every automobile accident. Human observation is imperfect. The opportunity to observe is incomplete particularly when an accident occurs as this one did in the nighttime; and human memory is fallible. With all these indeterminate factors, interest can do very remarkable things with the testimony of even honest witnesses.

And so, it is the usual thing when there is a collision or an accident of this kind that the witnesses have different and conflicting versions; and the interested parties, their relatives and friends, will testify as to one version and the other side to something that is irreconcilable and sometimes the direct opposite.

I might say, that in passing upon the credibility of the witnesses here, the Court must rely upon all of the usual aids and I do not believe it will serve any useful [255] purpose for me to detail what they are or to go into any extended or detailed analysis of the evidence.

The law that applies here I think is fairly simple. I do not believe that it is a case for the application of the Doctrine of Last Clear Chance. That seems to be conceded by counsel. The applicable law which governs pedestrians on the highway is that in walking along the highway they shall keep to the extreme edge of it and walk to their lefthand side facing oncoming traffic; and in case a car comes along it is the pedestrian's duty to step off of the paved or traveled portion of the highway so that the car may pass. In other words, it is the pedestrian's duty to give the right of way to the car, and I think it seems to be conceded here also that violation of this or any other positive safety statute is negligence per se.

Now, it seems to me that the problem as far as the Court is concerned is to determine whether or not the deceased and the plaintiff Mrs. Corbett were on the shoulder of the highway as they and their

witnesses have testified, or whether they were out on the main traveled portion or paved portion of this black top highway at the time this car struck them.

There has been no evidence of excessive speed and, according to the plaintiff's version, whether or not there was negligence on the part of the defendant driver [256] would depend upon whether or not he drove his car off of the main traveled portion of the highway and on to the shoulder. If he did so, it would be negligence. If he did not, of course, the accident would not have occurred. So, it seems to me that the case will be determined upon the question of whether or not these people were on the main traveled portion of the highway or on the shoulder.

It seems to me that the testimony of the state patrolman, who is one disinterested witness here, while it may be argued inferentially either way, leans or tends more toward the defendant's theory than it does towards the plaintiffs'. His testimony was that the skidmarks started about two feet inside of the paved portion of the highway and that there was no evidence of any travel or that the car had encroached upon the gravel shoulder which was three feet wide.

If we believe the plaintiffs' theory here, we must assume that these people were walking: Miss Wilson, behind her Miss White, Mrs. Corbett, and the deceased Frank, one behind the other, each on this gravel shoulder which was only three feet wide. I listened attentively to the testimony of all of these

witnesses and I noted that neither Miss Wilson or Miss White said that they stepped or jumped off of this gravel shoulder in order to avoid being struck by this car. Their testimony, as I recall it, was that they [257] remained where they were and that the right hand of each of them was struck, and that the car struck Mrs. Corbett who was behind Miss White and the deceased Frank who was behind Mrs. Corbett.

Now, in order to credit that story, it is necessary to believe that this driver who was along the highway traveling at not an excessive rate of speed, certainly being under the influence of liquor is not shown, suddenly for some reason unexplained, swerved off on to the gravel shoulder of the highway, missing the first two people, barely hitting their right hands, and struck the last two, and then turned his car back on to the highway and did not put on his brakes until he had gone on two feet on to the main traveled portion of the highway. It just doesn't seem to me that that could reasonably have happened at the rate of speed of forty miles an hour which the car traveled and not leave a mark which would be visible to the state patrolman on the gravel shoulder.

Now, I don't know whether or not the ex-serviceman was telling the full truth. I don't think that truthfulness depends upon whether or not you are in the Army or Navy or of the Indian race or White race. I don't think any race has any monopoly upon truthfulness by any means, and I don't think that the ex-serviceman was too accurate a witness.

I don't think, however, that his story was a complete [258] fabrication; and in order to find for the plaintiffs, it would be almost necessary to find that, because he did testify that these people were out on the paved portion of the highway and that is in accordance with the testimony of the other witnesses, the defendants Mr. and Mrs. Wilkerson and the passengers who were in their car. They all testified that the car swerved first and that then they either felt the impact or that they saw these people on the highway and that they were on the main portion of the highway at the time of the impact.

As to why the body of the deceased and why Mrs. Corbett after the impact were thrown off on the side of the road, I don't know. It has been said in some of the Washington cases that the behavior of automobiles and the persons struck by these automobiles is unaccounted for in many cases. As I remember the testimony, the main traveled portion of the highway was nineteen and a half feet wide and the shoulder on the south side was three feet wide, and so the distance from the center line of the highway to the outer edge of the shoulder would be about twelve and a half feet, and I think that the testimony is that these people were inside of the center line of the highway at the time they were struck. At any rate, looking at the four corners of the case, as I must pass upon the credibility of the witnesses and the weight of the evidence, [259] it is the finding of the Court that negligence has not been shown on the part of the defendant, and

that the deceased Frank and the plaintiff Mrs. Corbett were guilty of contributory negligence in walking on the paved portion of the highway and failing to step off at the approach of the oncoming car.

Mr. Brown: I will prepare findings based on your decision.

Mr. Felton: If the Court please, how long do we have to appeal; I don't know offhand in this court.

The Court: I would suggest that we look it up in the Rules of Civil Procedure.

Mr. Felton: Well, is it necessary to give Notice of Appeal at this time, or how much time do we have on it?

The Clerk: Judgment can be entered before Notice of Appeal.

The Court: Certainly, you wouldn't have to appeal from the announced decision of the Court; you would appeal after the entry of judgment.

Mr. Brown: While we are here, if it is all right with counsel, I will prepare findings and conclusions and submit them to him which may be sent to the Court to sign. Is that all right?

The Court: However, in order to have your record here, I am perfectly willing that the record show that the oral [260] notice of appeal is given.

Mr. Felton: I wish to give it.

The Court: But I wouldn't suggest that you rely upon that. At least you will have it if necessary.

Mr. Felton: I would like to ask that we be given at least sixty day for appeal.

The Clerk: You have got ninety days under the law from the date of entry of judgment or ninety days from the entry of the order denying motion for a new trial, less the number of days expired between the entry of judgment and the filing of the motion for a new trial. See Rule 73 of the Federal Rules of Civil Procedure.

Mr. Brown: Is it all right for Court to sign the Judgment in Spokane? Well, I will prepare findings and conclusions and present them to counsel before I submit them to the Court.

The Court: The Court will adjourn until tomorrow morning at ten o'clock. [261]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington,
Southern Division—ss.

I, Henry E. Neer, do hereby certify:

That I am the regularly appointed, qualified and acting Official Court Reporter of the District Court of the United States in and for the Eastern District of Washington.

That as such reporter I reported in shorthand the foregoing consolidated causes presented for trial before the Hon. Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington; that the above and foregoing pages numbered from 1 to 261, incl., contain a full, true, and correct transcript of the testimony introduced and the proceedings had on the trial of said causes, and that the same contains all objections made, and the rulings of the Court.

Dated this 15th day of July, 1946, at Spokane,
Washington.

s/ HENRY E. NEER,
Official Court Reporter. [262]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

Consolidated Civil Nos. 244 and 245.

TITUS CORBETT and MARTHA WOODS
CORBETT, husband and wife,
Plaintiffs,

vs.

JOHN C. WILKERSON,
Defendant,
and

LOTTIE FRANK, administratrix of the
Estate of LEVI FRANK, deceased,
Plaintiff,

vs.

JOHN C. WILKERSON,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW

These causes having heretofore been consolidated
for trial and having duly and regularly come on
for trial on the 8th day of May, 1946, the plaintiffs
being represented by their counsel J. H. Felton

and Bernice Bacharach, and the defendant by his counsel Nat. U. Brown, Kenneth C. Hawkins and F. S. Senn, and the Court having heard the evidence and the arguments of counsel and being fully advised, makes the following

FINDINGS OF FACT

1.

Jurisdiction founded on diversity of citizenship and amount. The plaintiffs are citizens of Idaho, and defendant is a resident citizen of the State of Washington. [277] The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars (\$3000.00).

2.

On Sunday, September 9, 1945, at about the hour of 1:00 a. m. on a public highway No. 830, about twenty-eight miles west of Goldendale in the State of Washington, the plaintiff Martha Woods Corbett and the decedent Levi Frank were struck by an automobile owned and at that time being operated by the defendant John C. Wilkerson, and that as a result thereof the said Levi Frank was almost instantly killed and the plaintiff Martha Woods Corbett sustained personal injuries.

3.

That at the time and place of said accident the defendant John C. Wilkerson was operating his car in a careful and prudent and legal manner and was in no wise negligent.

4.

That at the time and place of said accident the decedent Levi Frank and the plaintiff Martha Woods Corbett were guilty of negligence in failing to walk upon the extreme left hand side of the highway as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of defendant's car and to step to the left off the paved portion of said highway as required by said section.

From which said Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

1.

That this cause should be dismissed with prejudice and with costs to the defendant.

Done this 27th day of May, 1946.

SAM M. DRIVER,
District Judge.

O. K. as to form:

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Plaintiffs.

Presented by:

NAT. U. BROWN,
One of the Attorneys for
Defendant.

Filed: May 27, 1946. [279]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

Consolidated Civil Nos. 244 and 245.

TITUS CORBETT and MARTHA WOODS
CORBETT, husband and wife,
Plaintiffs,

vs.

JOHN C. WILKERSON,
Defendant,
and

LOTTIE FRANK, administratrix of the
Estate of LEVI FRANK, deceased,
Plaintiff,

vs.

JOHN C. WILKERSON,
Defendant.

JUDGMENT

These causes having heretofore been consolidated for trial and having duly and regularly come on for trial on the 8th day of May, 1946, the plaintiffs being represented by their counsel J. H. Felton and Bernice Bacharach, and the defendant by his counsel Nat. U. Brown, Kenneth C. Hawkins and F. S. Senn, and the Court having heard the evidence and arguments of counsel, and the Court

having made its Findings of Fact and Conclusions of Law,

Now, therefore, it is:

Ordered, Adjudged and Decreed, that these causes be and they are hereby dismissed with prejudice and that the defendant have and recover his costs and disbursements herein [280] to be taxed in the manner provided by law.

Done this 27th day of May, 1946.

SAM M. DRIVER,
District Judge.

Presented by:

NAT. U. BROWN,
One of the Attorneys for Defendant.

O. K. as to form:

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Plaintiffs.

[Endorsed]: Filed: May 27, 1946. [281]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Titus Corbett, Martha Woods Corbett, and Lottie Frank, administratrix of the estate of Levi Frank, deceased, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final

judgment entered in these consolidated actions on the 27th day of May, 1946.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Copy of this notice mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, June 20, 1946.

THOMAS GRANGER,
Deputy Clerk.

Filed: June 20, 1946. [282]

[Title of District Court and Cause.]

COST BOND.

Know All Men by These Presents:

That Whereas, lately at a District Court of the United States for the Eastern District of Washington, Southern Division, in consolidated suits pending in said Court between Titus Corbett and Martha Woods Corbett, husband and wife, plaintiffs, against John C. Wilkerson, defendant, and Lottie Frank, Administratrix of the Estate of Levi Frank, deceased, plaintiff, against John C. Wilkerson, defendant, a judgment was rendered in favor of said defendant, and said plaintiffs having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suits, being an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Ap-

peals to be holden at San Francisco, in the State of California. [283]

Now, this is a cost bond, conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, to the extent of not more than \$250.00.

TITUS CORBETT and MARTHA WOODS
CORBETT

By /s/ J. H. FELTON,
Attorney.

LOTTIE FRANK, Administratrix of the
Estate of Levi Frank, Deceased.

By /s/ J. H. FELTON,
Attorney.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By /s/ J. T. PARADISE,
Attorney-in-fact.

Countersigned:

WEISEL INSURANCE AGENCY,
R. O. WEISEL,
Agent, Moscow, Idaho.

Approved this 21st day of June, 1946.

(Seal)

A. A. LAFRAMBOISE,
Clerk, United States District
Court.

Filed: June 20, 1946. [284]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The United States District Court was in error in deciding for the defendant and in refusing to award damages to the plaintiffs, Titus Corbett and Martha Woods Corbett, for the reason that the evidence and exhibits produced showed negligence as a matter of law on the part of the defendant, which negligence was the cause of damage to Martha Woods Corbett, one of the plaintiffs.

2. The United States District Court was in error in granting judgment to the defendant and refusing to grant a judgment of damages to the plaintiff, Lottie Frank, for the reason that the testimony and evidence produced showed negligence as a matter of law on the part of the defendant, which negligence wrongfully caused the death of Levi Frank, the late husband of Lottie Frank. [285]

3. The United States District Court erred in admitting and excluding evidence, which omissions and excusions can only be pointed out specifically after the preparation of the transcript of evidence.

4. The United States District Court was in error in not granting damages to plaintiffs.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Service accepted and copy received this 20th day of June, 1946.

KENNETH C. HAWKINS,
NAT. U. BROWN,
Attorneys for Appellee.

Filed: June 20, 1946. [286]

[Title of District Court and Cause.]

MOTION

Come now the plaintiffs and appellants and move the Court to make an order to transmit to the Circuit Court of Appeals, Plaintiff's Exhibit A and Defendant's Exhibits No. 2 and No. 3, such exhibits being a map and photographs and not being capable of adequate reproduction.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Copy of this motion mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9, 1946.

A. A. LAFRAMBOISE,

Clerk.

[287]

[Title of District Court and Cause.]

ORDER

It is hereby ordered that the application of the appellants to transmit to the United States Circuit Court of Appeals the original Plaintiff's Exhibit A and Defendant's Exhibits No. 2 and No. 3 be, and the same is hereby, granted, and it is ordered that such exhibits be so transmitted.

Done in Open Court this 9th day of July, 1946.

SAM M. DRIVER,
District Judge.

Copy of this order mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9, 1946.

A. A. LAFRAMBOISE,
Clerk.

Filed: July 9, 1946. [288]

[Title of District Court and Cause.]

APPLICATION FOR EXTENSION OF TIME
TO PREPARE AND TRANSMIT RECORD
ON APPEAL.

Come now the appellants and respectfully move the Court to extend the time for the preparation and transmitting of the record on appeal to the maximum period fixed by Rule 73(g), for the reason that appellants have been informed by Mr.

Neer, the court reporter, that he is unable sooner to prepare the transcript.

J. H. FELTON,
BERNICE BACHARACH,
Attorneys for Appellants.

Copy of this Application mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9, 1946.

A. A. LAFRAMBOISE,
Clerk.

Filed: July 9, 1946. [289]

[Title of District Court and Cause.]

ORDER

On the motion of the attorneys for the plaintiffs and appellants for an extension of time in which to prepare and transmit the record on appeal, and good cause being shown therefor,

It is hereby ordered that the time to prepare and transmit the record on appeal to the United States Circuit Court of Appeals be, and the same is hereby, extended for a period of fifty days, that is, that the record shall be prepared and transmitted to the Clerk of the Circuit Court of Appeals within ninety days from the date of the first Notice of Appeal.

Dne in Open Court this 9th day of July, 1946.

SAM M. DRIVER,

District Judge.

Copy of this Order mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Defendant, July 9th, 1946.

A. A. LAFRAMBOISE,

Clerk.

Filed: July 9, 1946. [290]

[Title of District Court and Cause.]

APPELLANTS DESIGNATION OF CON-
TENTS OF RECORD OF APPEAL.

To the Clerk of the United States District Court:

Come now the appellants, by their attorneys, J. H. Felton and Bernice Bacharach, and designate the following pleadings, proceedings, and evidence which they wish prepared for transmission to the Circuit Court of Appeals in connection with appeal heretofore filed in this cause:

1. Plaintiff's Complaints.
2. Defendant's Answers.
3. Reporter's Transcript of Evidence.
4. Exhibits and Rejected Exhibits.

5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal.

Respectfully submitted,

J. H. FELTON,

BERNICE BACHARACH.

Service accepted and copy received of Appellants' Designation of Contents of Record of Appeal.

Dated June 20, 1946.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Defendants.

Filed: June 20, 1946. [291]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered 1 to 292, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled

cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, as the same remains on file and of record in my office, and that the same constitutes the record on appeal of the Appellants, Titus Corbett and Martha Woods Corbett and Lottie Frank, Administratrix of the Estate of Levi Frank, deceased, from the Judgment of the District Court of the United States for the Eastern District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$31.20, and that the same has been paid in full by J. H. Felton, of attorneys for Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 25th day of July, 1946.

(Seal) /s/ A. A. LAFRAMBOISE,

Clerk of said District Court.

[Endorsed]: No. 11400. United States Circuit Court of Appeals for the Ninth Circuit. Titus Corbett, Martha Woods Corbett and Lottie Frank, Administratrix of the Estate of Levi Frank, Deceased, Appellants, vs. John C. Wilkerson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed: August 2, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

Case No. 11400.

TITUS CORBETT and MARTHA WOODS
CORBETT, husband and wife,

Appellants,

vs.

JOHN C. WILKERSON,

Appellee,

and

LOTTIE FRANK, Administratrix of the
Estate of Levi Frank, deceased,

Appellant,

vs.

JOHN C. WILKERSON,

Appellee.

ADOPTION OF POINTS ON APPEAL

Come now the appellants and adopt the points on appeal in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as error all such matters and all adverse rulings in the admission, exclusion and refusal of evidence.

/s/ J. H. FELTON,

/s/ BERNICE BACHARACH,

Attorneys for Appellants.

Copy mailed to Nat. U. Brown and Kenneth C. Hawkins, Attorneys for Appellee, September 5, 1946.

/s/ J. H. FELTON,
Attorney for Appellants.

